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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 1079

WESTERN RADIO CORPORATION, A CORPORATION, AND PAUL S. BESHORE AND W. P. BESHORE, INDIVIDUALLY AND AS OFFICERS OF SAID CORPORATION,

Petitioners,

vs.

FEDERAL TRADE COMMISSION.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Petitioners, Western Radio Corporation, Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled case. The opinion of the Court of Appeals was rendered on November 23, 1964, the order of the Court of Appeals denying rehearing was issued on January 19, 1965, and a final decree was entered on January 27, 1965.

OPINIONS BELOW.

The court below affirmed an order to cease and desist entered by the Federal Trade Commission (hereinafter the "Commission") because of an alleged violation of Section 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719 (1914) as amended, 15 U. S. C. Sec. 45(a)(1) (1958).

The Initial Decision of the Hearing Examiner is appended hereto as Appendix A. The Commission's order proposing modification of the Initial Decision is appended hereto as Appendix B, and its opinion accompanying said order is appended hereto as Appendix C. The Commission's Final Order is appended hereto as Appendix D, and its opinion on peitioners' objections to the proposed modified order is appended hereto as Appendix E. The opinion of the Court of Appeals affirming the Commission but modifying one portion of Commission's order to cease and desist, is reported at 339 F. 2nd 937 and appended hereto as Appendix F. The Court of Appeals order denying rehearing and final decree are appended hereto as Appendix G and Appendix H.

JURISDICTION.

The order denying rehearing was entered January 19, 1965, and the final decree was entered on January 27, 1965. The jurisdiction of this Court in invoked under 28 U. S. C. 1254(1)(1958).

QUESTIONS PRESENTED.

1. When an investigator for the Commission testifies at a hearing on behalf of the Commission concerning certain facts and states that he prepared a written report on his investigation for a superior, is the Commission required, upon timely request made by the respondents, to

permit counsel for respondents to examine such report and to use it in the cross-examination of the witness?

2. Did the Commission's denial of the right to inspect such report deprive the petitioners of their property without due process of law in violation of Article V of the Amendments to the United States Constitution.

3. Can the Commission and the Court of Appeals satisfy constitutional requirements and avoid violating the doctrine of *Jencks* v. *United States*, 353 U. S. 657, by examining the report of the testifying investigator long after the hearing at which he testified and deciding that the report would not have been helpful to petitioners' counsel in the cross-examination of the witness, when neither petitioners nor their counsel have ever to this day been permitted to see or examine such report?

4. Does an order by the Commission that the petitioners cease advertising that their radio transmitters have a satisfactory operational range of any specified distance unless petitioners "are able to establish that their devices in fact have the operational range specified", unlawfully shift the burden of proving the falsity of advertising claims from the Commission to advertisers and thus deprive petitioners of their property without due process of law?

5. Is such a requirement in a cease and desist order commanding advertisers to refrain from claiming their radio transmitters have an operational range of any specified distance unless they "are able to establish" that their transmitters have the range specified, fatally vague and does it not deny due process of law in failing to disclose to whose satisfaction the operational range must be established, the petitioners', the Commission's or the Courts'?

6. Does this portion of the Commission's cease and desist order in limiting petitioners in advertising to claims

of operational range which they "are able to establish", seek to unlawfully shift to the courts the responsibility in enforcement proceedings of trying issues of fact which Congress has entrusted to the Commission, and thus deny petitioners due process of law?

7. Is proof that only two of the 20,000 radio transmitters sold by petitioners were tested by the witnesses for the Commission and failed to meet advertising claims, substantial evidence of the falsity of those claims, there being no expert testimony offered by the Commission that the components used by petitioners in their transmitter, when operating in concert with each other, are scientifically incapable of performing according to petitioners' representations?

8. Does a cease and desist order deprive the advertisers of radio transmitters of their property without due process of law, in requiring them as a condition precedent to their right to make the claim, "No license required", to disclose all the conditions of use under which a license would be required, even though the operating instructions sold with the transmitter set forth only uses of the transmitter which do not require a license?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED.

The statute involved in this case is Section 5(a) of the Federal Trade Commission Act, 38 Stat. 719 (1914), as amended, 15 U. S. C. Sec. 45 (a) (1958), which in pertinent part provides that:

> "(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> "(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . .

from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

The constitutional provision involved is Article V of the Amendments to the United States Constitution, which provides in part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT.

The petitioner, Western Radio Corporation, is a Nebraska corporation with its place of business in the City of Kearney and State of Nebraska. The individual petitioners, Paul S. Beshore and W. P. Beshore, reside in Kearney, Nebraska. Petitioners have been engaged in the advertisement on a nationwide basis through periodicals of general circulation throughout the United States, of a pocket-size, toy radio transmitter, the Radi-Vox transmitter, and the sale and shipment of said devices by mail from their office and factory in Kearney, Nebraska, to persons residing in the other states of this nation.

On April 2, 1959, the Federal Trade Commission issued a complaint against the petitioners charging that in their advertising they had falsely represented that their Radi-Vox transmitter

a. has a satisfactory operational range of up to one-half mile for every type of home radio receiver located in buildings;

b. has a satisfactory operational range of up to ten miles when transmitting from an automobile to any automobile receiver in another automobile;

c. carries a one year service guarantee;

d. requires no license to operate.

Thereafter the petitioners filed an answer denying the charges and hearings were held at various times and places. On July 25, 1962, the Hearing Examiner issued his initial decision and predicated thereon his order that petitioners cease and desist from representing in their advertising:

> a. That said portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of up to one-half mile for reception by home radio receivers, or that said device without additional equipment has an operational range of any specified distance in excess of fifty feet in city, town or commercial areas or seventy-five feet in country or rural areas;
>
> b. That said portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of from one to ten miles when transmitting from an automobile or other moving vehicle to a radio receiver in another vehicle, or representing directly or by implication that said device, so used, has a range of any distance in excess of two city blocks;
>
> c. That any product is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth, including the amount of any service or other charge which is imposed.
>
> d. That no license or permit is required for any operational use of said device, unless the specific conditions under which such license or permit would be required are clearly and conspicuously set forth in immediate conjunction therewith.

Thereafter the petitioners filed their exceptions to the initial decision and recommended order and argued the case orally before the Commission. On July 19, 1963, the petitioners received an order from the Commission, modifying the initial decision and permitting them to file objections to the changes in the cease and desist order. The

petitioners filed detailed objections to the changes in the order, and on September 15, 1963, the Commission issued its final order which commanded the petitioners to forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That their transmitters with or without the use of additional equipment have a satisfactory operational range of any specified distance unless respondents establish that their devices in fact have the operational ranges specified.

(b) That no license or permit is required for any operational use of their radio transmitters unless the specific conditions under which such license or permit would be required are conspicuously set forth in conjunction therewith.

(c) That any product is guaranteed unless the terms and conditions of such guarantee are clearly and conspicuously set forth, including the amount of any service or other charge which is imposed.

At one of the hearings the investigator who prepared the Commission's case testified on behalf of the Commission and volunteered that he had made and filed a report on his interviews of the Commission's witnesses and tests of operational range and field strength made by him and the other witnesses of the Radi-Vox transmitter. When petitioners' counsel asked to be permitted to examine this report, his request was denied by the Hearing Examiner. (R. 56, 57, 58—Appendix filed in Court of Appeals.)

The petitioner testified that up to January 8, 1960, 20,000 Radi-Vox transmitters had been manufactured and sold. Yet only three of these had been tested by witnesses for the Commission, one purchased by a John Mair, another purchased by a Dr. Paul Vatterott, and a third obtained by a government agent from petitioners' factory.

Petitioners petitioned the Court of Appeals for the

Seventh Circuit to review the Commission's order and upon consideration of the case the Court modified section 1(a) of the Commission's order by inserting the words "are able to" between the words "respondents" and "establish." The Final Decree states that said provision is modified to read as follows:

> "That their transmitters with or without the use of additional equipment have a satisfactory operational range of any specified distance unless respondents are able to establish that their devices in fact have the operational range specified."

The Court decreed that the order to cease and desist, as thus modified, be affirmed and that petitioners be commanded to comply therewith.

REASONS FOR GRANTING THE WRIT.

1. Charles T. Snavely, an investigator for the Federal Trade Commission, had investigated the petitioners' business, had interviewed most of the Commission's witnesses, had personally tested the two transmitters purchased by the Commission's two consumer witnesses, had been present when certain tests of the transmitters were made by others and caused still other tests to be made by other witnesses for the Commission. He was called as a witness for the Commission and testified as to these tests, among other things, and on direct examination referred to a written report he had made to the project attorney in charge of this case on his interviews and witnesses and on tests which had been made. When on cross-examination counsel for petitioners asked to see and inspect this report, his request was denied by the hearing examiner.

It seems well established that a respondent in an administrative proceeding is entitled to inspect reports made by a government witness prior to the hearing, as a part of

the cross-examining process of testing the credibility of the testimony of the witness. *Jencks* v. *U. S.*, 226 Fed. 2nd 540, 552, 353 U. S. 657; *Communist Party of the U. S.* v. *Subversive Activities Control Board*, 367 U. S. 1, 30, 124; *U. S.* v. *Lightfoot*, 228 Fed. 2nd 861, 335 U. S. 2; *U. S.* v. *Killian*, 246 Fed. 2nd 77, 82; *Carlisle* v. *Rogers*, 262 Fed. 2nd 19; *National Labor Relations Board* v. *Adhesive Products Corporation*, 258 Fed. 2nd 403.

The witness Charles T. Snavely was testifying on direct examination when he stated:

> "Well when we get an exhibit we attach a tag, and on the tag we put the date with a stamp. We have a stamp, and we fill in the date that we secured the exhibit. The 12/2 date on here is not the date I attached this tag, but it was between that date and the 15th when I made my final report, because I attached a physical-exhibit tag like this to the article when it was forwarded to Washington." (R. 53.)

On cross-examination the following questions were asked and answers given:

> "Q. Now you made mention of the fact that you had filed a final report sometime between September 1 and September 15, 1958.
>
> A. Yes.
>
> Q. Is that correct?
>
> A. Yes.
>
> Q. With whom did you file that report?
>
> A. That is sent to the project attorney in charge of the complaint. I don't remember the name. I have it here. The report that goes to Washington headquarters.
>
> Q. And did that report indicate what you had found with respect to the Western Radio Corporation?
>
> A. This report of December—I will have to look at it, if I may. December 15. December 15. I said September, I guess.
>
> Hearing Examiner Laughlin: You have testified

that you had something to do with it again in December but you haven't referred to any date thus far as to your report.

The Witness: O. K. Well, this is December 15, and it went to William S. Hill, project attorney, Bureau of Investigation, who had charge of this case. And in this report I referred to the interview reports that I had conducted when he sent the matter back to me for certain other information, one thing of which was to have the product tested.

Mr. Rowan: May I see that report?

Mr. Ferguson: I object to this, your Honor. This is confidential material." (R. 56, 57.)

The Hearing Examiner then discussed the question at length both on the record (R. 57, 58) and off the record and concluded with:

"Nevertheless I will stick to the safe procedure and sustain the objection." (R. 58.)

2. Mr. Snavely again took the witness stand at a later hearing and testified that he interviewed the witness, Dr. Paul Vatterott, and conducted tests of the Radi-Vox transmitter purchased by Dr. Vatterott, with unsatisfactory results (R. 93). Later he borrowed the transmitter and took it to the witness, Harold Bourell, for testing.

Mr. Snavely had also previously testified that he personally had tested the Radi-Vox tranmitter which he received from Mr. Mair, at his home, with no satisfactory performance (R. 51).

Thus Mr. Snavely's report in this matter covered interviews with the following witnesses: Mr. Mair; Mr. Hester; Mr. Vatterott; and Mr. Bourell. It also covered tests of the efficacy of petitioners' transmitter made by him personally at his home, and made jointly with Mr. Mair, Mr. Hester, and Dr. Vatterott. This was a substantial part of the Commission's case. Petitioners desired to examine the

reports to determine whether the results of the various tests were stated the same therein as orally upon the witness stand by Mr. Snavely as well as by the other witnesses.

Petitioners urge that the Hearing Examiner's ruling was erroneous and deprived them of their property without due process of law and that they were clearly entitled to inspection of the report under *Jencks* v. *U. S.*, 353 U. S. 657.

In that case the Supreme Court stated:

> "Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."
>
> "Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense."
>
> "We now hold that the petitioner was entitled to an order directing the government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense."
>
> "The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved."

While the *Jencks* case, 353 U. S. 657, was a criminal case, this Court has indicated that this rule is applicable in pro-

ceedings before administrative boards and Commissions. *Communist Party of the United States* v. *Subsersive Activities Control Board,* 367 U. S. 1, 30, 124.

The Supreme Court has held that in an administrative proceeding when a respondent's right of cross-examination of a government witness in unduly restricted, the decision of the administrative agency against such respondent will be set aside as erroneous with leave granted the administrative agency to reopen the proceedings against the respondent to permit additional hearings, should the administrative agency choose to do so. *Louis A. Reilly, as Postmaster of the City of Newark* v. *Joseph J. Pinkus, Trading as American Health Aids Co.,* 338 U. S. 269.

3. What the Commission did here violates the spirit and intent of the decision in *U. S.* v. *Jencks,* 353 U. S. 657. The Supreme Court said there that sufficient foundation is establishd for requiring the production of a report prepared by a government witness, by proof that the report concerned the activities covered by the witness' testimony. The Supreme Court further said that only after inspection of the report by the defendant, may the trial judge determine admissibility.

It does violence to the *Jencks* doctrine to refuse to permit the petitioners the right of inspection of the report by the government witness and to refuse them the right to determine whether they wish to use the report in the cross-examination of the witness, and then after the trial is long over to say that the report would not have helped them or that the Commission or the courts will disregard the testimony of the government witness.

The Court of Appeals' ruling that "Petitioners were not harmed by the error, if any, in the denial of their motion" was based on its examination of the Snavely report. Petitioners are now in the bizarre situation of having been

before two tribunals, the Commission and the Court of Appeals, on this question, and both tribunals have examined the report and ruled that it would not have been helpful to petitioners' counsel in the cross-examination of the witness, and yet neither the petitioners nor their counsel have ever to this day seen or examined the report.

In its decision the Court of Appeals stated that its examination of the Snavely report was with the "approval of the parties." This came as a surprise to counsel for the petitioners who was not aware that he gave such approval. Counsel's recollection is that when Judge Hastings asked him for such approval he declined to give it. Counsel called the attention of the Court of Appeals to this matter in a motion for rehearing and asked that this portion of the decision be corrected, but the motion was denied. The Clerk of the Court has informed counsel that no transcript was made of the oral argument so that the correctness of counsel's recollection cannot be verified.

The Commission in its opinion stated that it would disregard and not rely upon the testimony of its investigator, Snavely ("... we have not relied upon it"). This, in effect, is an admission by the Commission that its Hearing Examiner had committed error in his ruling.

The Commission cannot disregard Snavely's testimony. Snavely put the Commission's whole case together. It was he who interviewed all of the Commission's witnesses and presumably arranged to have them appear by subpoena and testify at the hearings. He interviewed witnesses Mair, Hester, Vatterott and Bourell. He tested the transmitters personally at home and made joint tests with Mr. Mair, Mr. Hester and Dr. Vatterott. He arranged with Mr. Bourell to make tests.

There is evidence in the record that the transmitters may have been damaged and not operative. If this were the

case, the testimony of the Commission's witnesses would be worthless. Mr. Snavely was the custodian for long periods of time of these transmitters. His testimony on the subject of the condition of the transmitters is essential to the Commission's case. He testified that the transmitter purchased by Dr. Vatterott was received in good order and since then had been laying in his office (R. 98). He denied knowledge of why the box in which it was kept was obviously damaged (R. 99, 100). Concerning the transmitter purchased by Mr. Mair, he denied knowledge of whether the device was damaged (R. 54). However, the very fact that he arranged to have tests made of the set creates the impression that he did not believe the set was inoperative.

4. With respect to the operational range of petitioners' transmitter the Hearing Examiner in his Initial Decision ordered that petitioners refrain from representing that the transmitter has an operational range in excess of fifty feet in cities, seventy-five feet in rural areas, or two city blocks when used to transmit from one moving automobile to another.

The Commission on review revised this portion of the order to provide that the petitioners shall not represent that their transmitters have a satisfactory operational range of any specified distance unless petitioners "establish that their devices in fact have the operational ranges specified."

The Court of Appeals modified this provision to provide that the petitioners shall not claim that their transmitters have a satisfactory operational range of any specified distance unless petitioners "*are able to* establish that their devices in fact have the operational range specified." (Emphasis supplied.)

The Court of Appeals' modification fails to remedy the

basic defect existing in this provision. Even as modified the provision seeks unlawfully to shift the burden of proof from the Commission to the petitioners. They are the ones required by the order to make proof, not the Commission. In case the Commission feels that the order has been violated it becomes the proponent of that proposition and should bear the burden of proving it. Petitioners should not be subjected to the burden of proving their innocence. They should be presumed to be in compliance with the order until it is shown by proof submitted by the Commission that they have committed violations.

5. The Court says that all this modified provision requires is that petitioners shall not make a claim of any specified operational range for their transmitter "unless they are able to establish" that their transmitter has the operational range claimed. However, the evidence in this case shows that the petitioners thought they were doing this very thing and still ended up with a Federal Trade Commission complaint against them. The evidence of operational range which satisfied the petitioners did not satisfy the Commission. Thus, when it is said that the petitioners are not to make claims of operational range until they "are able to establish" that their transmitter has the operational range specified, the question arises of to whose satisfaction the range must be established, the petitioners', the Commission's or the Court's.

Indeed, the question also arises of why such an order should be issued at all. It finds no facts. It gives petitioners no guidelines for future conduct. It requires no more of them than is already required by law without an order, except that it may subject them to a penalty suit in case of a claim of operational range which the Commission does not like. And in such a suit the Court becomes the fact finder, instead of the Commission, as was intended by the Federal Trade Commission Act.

6. In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 54, 68 S. Ct. 822, 832 the U. S. Supreme Court reviewed a decision by the Court of Appeals, Seventh Circuit, sustaining an order by the Commission commanding discontinuance of certain violations of the Robinson Patman Act. The Court set aside the order, and Justice Black observed:

> "The enforcement responsibility of the courts, once a Commission's order has become final either by lapse of time or by court approval, 15 U. S. C. A. 21, 45, is to adjudicate questions concerning the order's violation, not questions of fact which support that valid order".

In the *Morton Salt Co.* case the Commission had prohibited the sale of salt at different prices to competing wholesalers or to competing retailers, subject to this proviso: ". . . provided, however, that this shall not prevent price differences of less than five cents per case *which do not tend to lessen, injure, or destroy, competition among such wholesalers, or retailers*". (334 U. S. 51, note 19.) (Emphasis supplied.)

This provision the Supreme Court rejected as a shifting by the Commission of its fact finding function to the courts. The Supreme Court said:

> "But once the Commission exempted the differentials in question from its order, we are constrained to hold that as to those differentials, it could not then shift to the courts a responsibility for enforcement proceedings of trying issues of possible injury to competition, issues which Congress has primarily entrusted to the Commission".

We urge that the issue of the extent of the operational range of petitioners' transmitter is for the Commission, not for the courts.

7. The Court of Appeals in its decision found that proof that only two of 20,000 transmitters manufactured by

petitioners, had less operational range than advertised, was sufficient evidence on which to base a finding of misrepresentation, that petitioners had failed to prove that the rest of the 20,000 transmitters it had manufactured lived up to the advertising claims, and that there was no need of scientific evidence establishing theoretical incapability of the transmitter to meet advertising claims. The Court said:

> "There was no evidence to show that performance of any number of the 20,000 lived up to the advertising claims".

It should be pointed out that petitioners in this case, like all other respondents in Federal Trade Commission proceedings, are not required to prove anything. There is no burden of proof on them. No inference may be drawn against them, if they fail to prove the charges false. It is the Commission which bears the burden of proving its charges with substantial evidence, and persons sued by the Commission may simply challenge the sufficiency of the Commission's proof. We urge that proof that two units of a total mass of 20,000 are deficient in performance is not substantial evidence that the entire mass is deficient in the absence of evidence that the causes of the deficiency in the two units also exist in the other 19,998 units.

8. The Commission included in its order a provision that the petitioners cease and desist from representing:

> "(b) That no license or permit is required for any operational use of their radio transmitters unless the specific conditions under which such license or permit would be required are conspicuously set forth in conjunction therewith".

If the petitioners sell their transmitter with an instruction sheet which describes only methods of operation which do not require a license, they should be entitled to say "No

license required" without qualifications. They should not be required to describe those methods of operation which would require a license. Petitioners desire to tell purchasers of their transmitters how to operate without a license in compliance with pertinent laws and regulations. They feel that it is unfair to require them to describe all the possible ways in which such laws and regulations may be violated.

It is conceded that under certain circumstances the Commission is authorized to compel an advertiser to disclose material facts in his advertising where such disclosure is necessary to prevent deception. However, here the Commission has required far more than is necessary to prevent deception.

In *Alberty* v. *F. T. C.*, 182 Fed. 2nd 36, 39, the Commission's order permitted the respondent to advertise that its medicinal preparation would help relieve lassitude due to iron deficiency anemia, but the order required the respondent to also state that lassitude is caused less frequently by simple iron deficiency than by other causes and that in such cases the preparation will not be effective. This the court held to be improper, saying:

> "Both purpose and terms (of the Act) are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority".

All that was reasonably needed to prevent deception in the present case is an order prohibiting the claim "no license needed", if the operational uses suggested in the instruction sheet, or any of them, required a license. If none of the operational uses suggested in the instruction sheet would require a license, certainly no disclosure is needed.

CONCLUSION.

The writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A.

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

In the Matter of Western Radio Corporation, a corporation, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation.	Docket No. 7468.

INITIAL DECISION.

Loren H. Laughlin, Hearing Examiner.

Garland S. Ferguson and *John J. McNally*, for the Commission;

Charles H. Rowan, Milwaukee, Wisconsin, and *C. W. Collins*, Los Angeles, California, for the Respondents.

This is a proceeding under the Federal Trade Commission Act, charging violation of § 5 thereof in that respondents have falsely advertised, in interstate commerce, a pocket-size radio transmitter designated by them, and referred to usually in the record herein, as Radi-Vox. There are four distinct charges alleged in Paragraphs Five, Six and Seven of the complaint, which in substance are that respondents have falsely claimed in advertisements inserted in newspapers and magazines of general circulation, as well as by circulars and other material distributed through the mail and otherwise, that their radio transmitting device in question:

1. has a satisfactory operational range of up to one-half mile for every type of home radio receiver located in buildings;

2. has a satisfactory operational range of up to ten miles when transmitting from an automobile to any automobile radio receiver in another auto;

3. carries a one-year service guarantee; and

4. requires no license to operate.

Respondents, in substance, deny these charges in their answer. It is found herein that the material allegations of the complaint either have been admitted by respondents or have been sustained by preponderance of the evidence, and an appropriate order is hereinafter issued.

The complaint herein was issued April 2, 1959, and the respondents filed their answer on June 10, 1959. While the record is short, the subsequent history of the litigation is somewhat complicated, and must be stated in order to determine herein the real contentions of respondents. Prior to any hearings, counsel supporting the complaint and respondents' counsel negotiated a consent agreement, which was submitted to the Hearing Examiner on October 27, 1959. It disposed of the first three charges, but reserved the right to litigate the fourth charge. Reference would not be made herein to any proceedings relating to this consent agreement, since they are not a part of the official record, except that respondents, in their proposed findings, insistently contend that the initial decision of the Hearing Examiner accepting said consent agreement and issuing an order in accordance therewith is final and binding upon the parties as to the first three charges, and limits the issues for trial and decision to the fourth charge. Respondents also, as a part of their proposals, tender the same order that was stipulated in said consent agreement.

The Hearing Examiner issued his initial decision accepting said consent agreement on October 28, 1959, and thereafter, upon review, the Commission, on December 2, 1959, issued its order vacating such initial decision as "not appropriate in all respects to dispose of this proceeding", and remanded the case to the Hearing Examiner for further proceedings. It is the respondents' contention (Proposed Findings, pp. 1-3, paragraphs 1 and 3) that, the agreement having been duly approved by respondents and by counsel supporting the complaint and the Bureau of Litigation of the Commission, and the initial decision accepting said agreement being in strict accord with the then Rules of Practice of the Commission, the said agreement became final and binding, and that the first three charges of the complaint are not litigable herein because:

1. said initial decision was not served upon the parties until November 14, 1959, and the Commission's order vacating it was improper since it was issued on December 2, 1959, more than fifteen days thereafter;

2. no party had appealed from the initial decision; and

3. there was no sound factual basis for its disapproval by the Commission.

No such contention had previously been made by respondents throughout the course of this proceeding since the vacation of said initial decision.

Respondent's counsel have erroneously attempted in such contention to apply the present rules of the Commission, which are greatly misconstrued by counsel, to a proceeding which was conducted entirely under the Commission's then applicable May, 1957 Rules of Practice for Adjudicative Proceedings. Under § 3.25 of those Rules, and in strict pursuance thereof, the initial decision accepting the consent agreement was issued and served within thirty days following the submission to the Hearing

Examiner of said agreement, and while a joint appeal by the parties was provided for by such Rules in the event the Hearing Examiner did not approve the consent agreement, the Commission retained its authority and discretion, under § 3.25(e) thereof, without limitation as to time, either to approve or reject any consent agreement accepted by the Hearing Examiner and his initial decision thereon, and to remand the case to the Hearing Examiner for adjudication in regular course. Furthermore, the said initial decision under consideration here, in accord with such Rules, was in no sense final, expressly providing, "The agreement shall not become a part of the record unless and until it becomes a part of the decision of the Commission." Also, a consent-order adjudication, under the Commission's Rules, always has been and still is a matter of discretion to end litigation upon agreement, and is not a determination of any contested factual issues.

Under the Commission's present Rules, Hearing Examiners are no longer concerned with consent settlements, which are now delegated to the Office of Consent Orders under Part 3 of the Commission's Rules of Practice, Procedures and Organization effective June 1, 1962, which Part 3 became originally effective July 21, 1961. Counsel for respondents is evidently also confused by the current Rules of Practice for Adjudicative Proceedings, which is Part 4 of the Commission's present Rules of Practice, Procedures and Organization. § 4.19 of the Rules of Practice for Adjudicative Proceedings provides that a petition for review of an initial decision must be filed within fifteen days after service of the initial decision, but also provides that the Commission has an additional fifteen days within which to place a case on its own docket for review. This rule has no application whatsoever either to current consent-order procedures or to any consent-order proceeding coming under the former rules, such

as the one under consideration here. Neither of these consent-order procedure rules limits the Commission's time for consideration and disposition of a consent-order agreement. The several contentions of respondents in this respect are therefore wholly without merit, and the said abortive 1959 consent-order proceedings constitute no bar to adjudication in regular course of any issue in this case.

Following the remand of this case to the Hearing Examiner for further proceedings, hearings were held on January 7-8, 1960, in Washington, D. C., during which hearings evidence was presented only in support of the fourth charge of the complaint, which involved only the issue that respondents had falsely advertised their said Radi-Vox as requiring no license to operate. At these hearings, counsel supporting the complaint presented evidence in support of that charge only, and respondents likewise presented their defense only as to such charge. No rest was taken by either party on any charge of the complaint, the matter being left open for further proceedings by both parties.

On February 9, 1960, counsel supporting the complaint filed a "Motion To Reopen Hearing As To The Issue Covered By Paragraph Seven, Subparagraph 4 Of The Complaint", on the ground of surprise arising from the testimony of respondent Paul S. Beshore, who had testified for respondents on January 8, 1960, in essence that two units of said Radi-Vox which had been submitted to the Federal Communications Commission were not of the kind sold to the public, but were experimental units from the respondents' laboratory, which had substantially higher field strength than the regular production models advertised and sold by respondents, and that the same, in his absence from respondents' factory, were erroneously given to a representative of the Federal Communications Commission by some employee without Beshore's knowledge.

Respondents strenuously objected to any further hearings on said fourth charge in their "Memorandum Opposing Motion To Reopen Hearing", filed on February 17, 1960.

Counsel supporting the complaint, according to said motion, desired to take the testimony of one Ablowich, a former employee of the Federal Communications Commission, who, such counsel claimed, was available to testify and, if called, would controvert the said testimony of respondent Paul S. Beshore.

On March 21, 1960, the Hearing Examiner issued his interlocutory order reopening the hearing as to said fourth charge as being in the public interest, in order that all available evidence pertaining thereto might be fully presented on the record. Following this, a number of hearings were held on all four charges of the complaint, on various dates on and between March 29, 1960, and April 3, 1961, in Kansas City and St. Louis, Missouri, and Los Angeles, California. At the hearings in St. Louis and Kansas City, evidence was received in connection with the first three charges of the complaint, while the hearing at Los Angeles was devoted exclusively to the testimony of the said witness Ablowich relating solely to the controversial fourth charge of the complaint. After the completion of these hearings, respondents presented their evidence in defense at two hearings, one in Washington, D. C., on October 18, 1961, and one which was finally held in Omaha, Nebraska, on April 2, 1962, after unavoidable delays caused by the removal of one of respondents' expert witnesses and the accidental death of another just prior to the time set for their respective appearances to testify.

Respondents' defense having been concluded, counsel supporting the complaint was given until May 1, 1962, in which to elect to present rebuttal evidence. On that

date, such election not having been made, and all evidence having been presented, the reception of evidence was terminated and June 15, 1962, fixed as the date for submission by the parties of their proposed findings, conclusions and order, which were duly filed.

On October 16, 1959, counsel for the parties had agreed upon a stipulation as to certain facts material to the fourth charge of the complaint and the denial thereof by respondents, relating to the necessity for a license for the device in question under the regulations of the Federal Communications Commission. At that time it was anticipated that the consent agreement would be accepted by the Commission, and that it would be unnecessary to try the other three issues which were covered thereby. Subsequently, as above stated, the Commission rejected the consent agreement and the case came on for trial on all issues. On the first day of hearing, January 7, 1960, by agreement of parties, the stipulation was received in evidence as Commission's Exhibit 1. In their proposed findings (Paragraph 4, page 3) the respondents for the first time contend that such stipulation, when received in evidence, limited all future hearings to consideration of the fourth issue alone. A careful study of the stipulation reveals that it contains no such limitation, and subsequent trial of the case, wherein all parties contested all issues, demonstrates beyond question that respondents did not consider such a limitation to exist. Respondents' contention that the stipulation limits the proceeding to consideration of the fourth charge only is therefore rejected as inconsistent with the facts and wholly untenable.

Respondents, in their proposed findings, raise only one other question with respect to the procedure followed by the Hearing Examiner. They contend that there is error in the Hearing Examiner's refusal to permit examination of an investigation report made to the Commission by

the witness Charles T. Snavely, an attorney-examiner for the Commission. This witness testified on March 29, 1960, in Kansas City respecting his procurement of a Radi-Vox purchased by the witness John E. Mair by mail from respondents as a result of one of their published advertisements. Snavely testified, in substance, that he interviewed Mair on September 3, 1958, and that he, jointly with Mair, tested the device as to range and the transmission of any intelligible conversation, without satisfactory results; that Mair permitted him to take the device with him, and he then made personal tests on his portable radio at home, as well as on his car radio, all without satisfactory operation, although the instruction sheets which Mair had received with the radio were followed strictly in all tests. Snavely then obtained a loan of the device from Mair for further tests, and subsequently had it tested by experts.

In the course of his direct examination Snavely referred briefly to his final report to the Commission, and on his cross-examination respondents' counsel inquired further about such report, which was dated December 15, 1958, and finally asked to see the report, to which counsel supporting the complaint objected on the ground that it was confidential material. The Hearing Exmainer sustained the objection because the Commission had never delegated any authority to its employees or to Hearing Examiners to disclose any such official reports, and stated in substance that the Commission itself, within its discretion, would be the only authority capable of ordering the production of said report (Tr. 110-113). In its order denying interlocutory appeal issued September 15, 1958, in *Sun Oil Company,* Docket 6834, the Commissions granted discretion to its Hearing Examiners, where there is admittedly a prior statement of a witness referring to a documents signed by him and contained in the Commission's

confidential files, to screen such documents, and in the exercise of sound discretion, to permit their use in the cross-examination of such witness. In that decision, however, the Commission adhered strictly to its Rules relating to the release of confidential information insofar as such related to interview reports by its employees, and did not delegate the authority to require their production, under any circumstances, to its Hearing Examiners. Since counsel for respondents did not avail themselves of the patent remedy provided by the Commission's said Rules, of requesting the Commission itself to order the production of the requested document, and the Hearing Examiner had no authority to do so, there is no error in the Hearing Examiner's refusal to require the production thereof.

The Hearing Examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of each of the witnesses who appeared before him. All procedural and evidentiary matters have been thoroughly reviewed, and all rulings made during the course of the proceeding are hereby confirmed. All arguments, proposals and briefs of counsel have been carefully studied and considered in the light of the entire record, and all such proposals not herein adopted either verbatim or in substance and effect are hereby rejected.

Upon the whole record, the Hearing Examiner finds generally that counsel supporting the complaint have fully sustained the burden of proof incumbent upon them, and have established, by substantial, reliable and probative evidence, and the fair and reasonable inferences drawn therefrom, all the material allegations of the complaint. The Hearing Examiner therefore makes the following:

Findings As To The Facts.

The facts alleged in Paragraph One of the complaint are admitted by the answer, and also stipulated. Therefore it is found that respondent Western Radio Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nebraska, with its office located at Kearney, Nebraska; that individual respondents Paul S. Beshore and W. P. Beshore are officers of said corporation; that they formulate, direct and control the policies of the corporate respondent; and that the address of the individual respondents is the same as that of the corporate respondent.

The facts alleged in Paragraph Two of the complaint are likewise admitted by the answer and also stipulated. It is therefore found that respondents are now, and for more than one year last past have been, engaged in the manufacture, sale and distribution of various kinds of electronic devices, including portable radio transmitters sold under the names of "New Magic Walkie Talkie", "Radi-Vox" and "Radio Talkie".

The facts alleged in Paragraph Three of the complaint are also admitted by the answer and stipulated. It is therefore found that in the course and conduct of their business respondents ship their products from their place of business in Nebraska to purchasers thereof located in various other states, and maintain, and have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. The evidence, moreover, proves the substantial extent of respondents' business. Respondent Paul S. Beshore testified that they have a plant occupying a square block of area in Kearney, Nebraska, of which approximately 40,000 square feet of space is used for manufacturing their various products. The testimony of the witness Ablowich

went into considerable detail concerning the various parts of respondents' offices and factory, their machinery, their operations, their manufacturing of the Radi-Vox as well as of intercommunication sets, broadcast receivers, and other related electronic products not involved in this proceeding, and the large number of employees he saw engaged there in their work at the time of his visit in early February, 1957.

While the fourth paragraph of the complaint, relating to respondents' competition in commerce, was denied by the answer, the facts therein set forth were later stipulated, and the testimony of respondent Paul S. Beshore further shows that as of January 8, 1960, respondents had manufactured approximately 20,000 of the Radi-Vox device here in question. It is therefore found that respondents in the conduct of their business were, and are, engaged in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of portable radio transmitters and related electronic products.

There were received in evidence, without objection, two advertisements of respondents relating to the Radi-Vox, Commission's Exhibits 11 and 12, which were advertisements published respectively in the January, 1957, and July, 1958, issues of the magazine Popular Science Monthly. There was also credible testimony that the same ad appeared in the magazine Mechanix Illustrated (Tr. 91). These two publications were then, and now are, magazines of general circulation throughout the United States. The respondents also used mail circulars and other advertising material offering such device to the public. Commission's Exhibit 13-A, -B is typical of these circulars. This proceeding is premised upon the representations contained in such advertisements.

The evidence relating to the third charge of the complaint, that respondents' device carries a one-year service guarantee, will be first considered, since it is determinable solely upon the basis of respondents' said advertising and their instructional sheets (CXs 3-A, -B and 16-A, -B, and RX 11-A, -B). The respondents' said advertisements published in magazines stated in this respect:

> "Guaranteed to Work. 1 Year Service Guarantee."

In their circulars respondents stated in such respect:

> "Further—Radi-Vox is guaranteed free from defects in workmanship or material for one year from date of purchase."

Respondents' sales of Radi-Vox devices were made as a result of these advertisements, and delivery was made to the purchasers by the United States mails. In the shipping containers of said devices, respondents placed circulars setting forth operating instructions (CXs 3-A, -B and 16-A, -B, and RX 11-A, -B). The purchaser, upon reading such instructional sheets, learned for the first time that "During the period of one year after purchase, repairs will be made for a charge of $1.50 for postage and handling". In these instructions, also for the first time so far as the purchaser knew, respondents reserved the right to determine whether such devices "have failed due to improper battery installation, alteration or unusual abuse", and agreed, after such determination, to repair said devices "on an actual cost basis and return collect on delivery for the charges due in addition to the standard handling and postage charge of $1.50". This more specific follow-up guarantee contained in the instruction sheets sent to all purchasers who bought the device by mail during the years preceding the institution of this case was only changed in a few particulars in the guarantee used currently by respondents at the time of the hearings (RX 11-B). There

was an increase in the postage and handling charge from $1.50 to $2.00, and a new statement that other actual repair charges "generally will be $3.00 for any reasonable repair".

Since the magazine advertisements which the public first saw induced the purchase, this first impression on the prospective purchaser is the determining factor upon the question of deception with reference to the guarantee. It is now well established "that a guarantee per se negatives the idea of a further consideration" (*Parker Pen Co.* v. *F. T. C.* (C. C. A. 7, 1946), 159 F. 2d 509, 511). This case and many cited therein, as well as numerous subsequent cases, have established beyond question the principle that the Commission's duty is to protect the uninformed, casual or negligent reader from deception by false advertising. Therefore information furnished subsequent to the tender of a guarantee, belatedly revealing the true facts to the purchaser concerning all conditions and limitations attached to such guarantee, does not alleviate the first deception, nor absolve the advertiser from responsibility for his original false representations. Since the original statement of guarantee was absolute and without any qualification, it is therefore necessarily found that respondents have falsely and deceptively represented that their Radi-Vox is unconditionally guaranteed for one year, in violation of § 5 of the Federal Trade Commission Act, as set forth in the third charge of the complaint.

The first and second charges of the complaint may be considered together because the evidence pertaining thereto is linked together in the testimony of the witnesses who referred to these matters; and likewise in respondents' advertisements containing these two types of misrepresntation, they are either expressly stated together, or closely mingled in their arrangement in the text.

Respondents' "Radi-Vox" is a small radio transmitter which is succinctly and well described by the Federal Communciations Commission experts who testified. This description is:

> "The device consists of a small transmitter unit designed to be held in the hand, 2½ x 4½ x 1¼ inches in size. The antenna extends 7½ inches out of the case, and an extension is provided to make the antenna extend 16½ inches out of the case. * * * The transmitter itself consists of a transistor supplied by a 6-volt battery. The unit is designed to operate in the lower part of the standard broadcast band and is tunable by a slug. A microphone is built into the face of the unit" (CX 4, Report of John Knight, F. C. C. Project Engineer, F. C. C. Office of Chief Engineer, Laboratory Division, joined in by E. W. Chapin, Chief of said Division, and another executive official thereof; and CX 19, Report of H. W. Bourell, Engineer in Charge of the Kansas City, Missouri, Field Operating Division of F. C. C.).

Under the accompanying instructions, the Radi-Vox device is put into operation by pulling down a "Talk Switch" and manipulating a frequency setter button and the extension of the antenna as may be required.

The rather small magazine advertisements of Radi-Vox, pertinently to these two charges, emphasize the following statements, largely in capital letters:

> "Broadcast to Any Home or Car Radio Without Wires or Hookups!"
>
> "With this Radio Talkie you now Can Talk to Your Friends Up to a Block or More Away! Talk up to 1 mile or more between 2 automobiles. Instant Operation! Just push button to talk!"

In the circular enclosed with the device when mailed to the purchaser, in bold script type, appears the following:

> "Talk to all house and car radios everywhere! * * * No wire connections required!"

These words are followed by large capitalized letters, stating:

> "Normal range up to ½ mile*",

followed by the word "Guaranteed". In the small-print footnote to which the star refers, the circular states:

> "We guarantee Radio Talkie will transmit or send your voice without extra connectors or wires while you walk, to any ordinary radio anywhere in your local area or building and up to ½ mile or more when operated in accordance with simple instructions and precautions. We guarantee that Radi-Vox will transmit or send your voice on wave bands from 550 to 800 Kilocycles at Will by a simple dial adjustment."

This circular further states:

> "Broadcast to Any Home or Car Radio Without Wires or Hookups of Any Kind! * * * Has Sensitive Voice Microvolt and Frequency Setter. Push to Talk Switch —Instant Operation."

The circular further emphatically sets out more specific representations:

> "Talk to Any One Radio Only or to All or Any Group of Radios in Nearby Locations.
>
> "Talk from car to car up to 1-10 miles apart. Any number of cars can be used!
>
> "Between hotel rooms—upstairs or down.
>
> "From car to trailer—to house.
>
> "Between buildings up to ½ mile or more.
>
> "Break in regular radio broadcasts!"

While elsewhere in this circular reference is made to instructions which will come with the device "for operation in cars, homes, between buildings—over miles of phone lines", such language does not alter the definite statements made elsewhere therein. Furthermore, in the magazine advertisements there is additional language,

> "Completely Ready to Operate with instructions and hundred of ways and tricks for broadcast through any radio you desire."

This language also does not alter the positive representations previously made.

Two consumer witnesses credibly testified in support of the case-in-chief. It does not appear that either one of them had complained to the Commission before being interviewed by its representative Snavely. John E. Mair of Kansas City, an assembler at General Motors, bought his Radi-Vox through an ad in the Popular Science magazine, which ad he had seen in that and several other magazines, including Mechanix Illustrated, for a considerable period of time before he actually bought the device. He received his Radi-Vox in August, 1958, and attempted to operate it. He read the accompanying instructions, but certain information contained therein, which indicated conditions and areas where trouble in operating the device would occur had not appeared in the ad through which he became interested and purchased the device. He found that the device did not seem to work, even after he bought new batteries for it. He tried it on several different radios, and could only get a squeak when he touched antennas. It was during the period of his tests that the Commission's attorney-examiner Snavely, who had obtained from respondents a list of Radi-Vox buyers' names in the area, came to his home and inquired about his Radi-Vox; and the two of them made several tests together in Mair's home. Mair

made no attempt to communicate with respondents, and heard nothing further from them after receiving the device. There was an attempt on cross-examination of his witness to develop that he lived in an electrically noisy neighborhood, and also that he took the Radi-Vox apart, but the witness, while admitting there was electrical equipment in the neighborhood, stated he was unable at any time to get the device to work, even when all electric lighting and other possible interference was turned off, and also stated he did nothing but install new batteries in the Radi-Vox. Snavely, after fruitless tests in company with Mair, as already stated, later borrowed the device and then unsuccessfully tested it himself, both in his own apartment within an area free from business noise and in his auto, and it worked neither place. He then gave it to the witness Robert W. Hester, who owns and operates a television and radio service company. With Snavely, Hester ran some preliminary checks on the device, according to its instruction sheet, and they found it would not work except with an additional carrier wire. Hester detailed the indoor checks, and then testified that they took it outdoors, beyond the range of any radiated noise, and after various tests with different receivers, were unable to get any reception from the Radi-Vox other than just some noise.

Hester then referred Snavely to the Television Service Engineers, a trade association of which Hester was a member, for a more thorough testing of the device. The said Radi-Vox was finally referred to this organization's Technical Committee, of which one Donald Day was Chairman. Day, a radio and electronics technician with considerable experience, including teaching in that field, made further tests with the instrument, using recognized standard testing equipment. His tests, on the Hammurlund H. Q. 129 Receiver in a light commercial business zone, gave intelligible voice reception for only about forty feet.

An automobile radio check in the same area resulted in reception at approximately only twenty feet. He then took the Radi-Vox and the testing equipment twenty miles outside of Kansas City, into a sparsely-populated area with no obstructions, and in that rural territory set up the Hammurland and attached approximately 100 feet of aerial to the receiver. There a barely-intelligible reading of the Radi-Vox without attachments was obtained at about 350 feet distance, under excellent testing conditions. A test was also made with the automobile radio at the same rural location, with a perceptible radiation of only about 75 feet from the Radi-Vox. Use of the Hammurlund Receiver approximately doubled the distance of reception in the several tests, but, as Day reported it, a Hammurlund Receiver is "normally not in the hands of the average radio listener" (R. 122, CX 12-B). After other similar tests, he made a report of his findings in writing, which he gave to Snavely (CX 12-A, -B). His conclusions in the report were that communication between cars up to a mile or more, or between houses a block or more apart, would be possible only under special conditions, if at all.

The second consumer witness called by the Commission was Dr. Paul B. Vatterott, who also purchased a Radi-Vox from the respondents through a magazine ad in Popular Science. His attempts to make it work failed, and he thereupon opened it and found a connection was corroded by a leaking battery, so that he had to replace the battery. He made several attempts to transmit messages from his automobile to another driven by his brother-in-law on a trip they and their families made to Colorado. The Radi-Vox worked when the cars were about fifty feet apart, but when they were one or two blocks apart the Doctor's voice was not audible in the other car. He also tested the device in his private office by attempting to call his nurse out in the reception room, where there was a radio; this attempt

worked out so poorly it was finally given up, although the distance between the transmitter and the receiving radio was only about twenty-five feet. He also tried the Radi-Vox out at home, but it would not work in excess of fifty feet from the receiving radio.

The Commission's representative, Snavely, called upon him, as he had upon Mair earlier and was permitted to take the Doctor's Radi-Vox for testing and checking in the summer of 1960. The Doctor was quite objective in his testimony, and volunteered that he did not expect too much for the small amount he had paid for the Radi-Vox, and on cross-examination conceded that he had not followed all of the instructions that came with the device. Repeated inquiries as to whether he had used any additional equipment or bought a coupler to connect the transmitter to the automobile antenna, as set forth in the instruction sheet, were answered by him in the negative. This, of course, was of little importance, since the advertisement itself promised practically universal use without reference to additional hookups.

Snavely, in June, 1960, delivered this Radi-Vox to the witness Harold W. Bourell, engineer in charge of the Kansas City Federal Communications Office, an experienced radio engineer. Upon receiving authority from the Washington office of that Commission, Bourell, using several standard field intensity meters, checked and rechecked the Radi-Vox for its field-intensity measurements or radiation. He made a complete, detailed report thereof (CX 19), dated August 29, 1960. From his tests he found, among other things, that six feet from the Radi-Vox with its antenna fully extended, voice modulation was fairly clear and could be understood, but at ten feet it was too weak and distorted to be understood, and could not be heard at all beyond fifteen feet. His tests were made on

several days in August, 1960, at his home and in an open residential area free from industrial radio noises, and as a result of his test, wherein he used a 70-foot antenna, the signal strength of 200 microvolts per meter at a distance of 100 feet was far in excess of that authorized without a license from the Federal Communications Commission under Part 15 of its Rules and Regulations. His further conclusions as to respondents' device violating such rules are subsequently referred to in connection with the evidence relating to the fourth charge of the complaint.

Respondent Paul S. Beshore manifestly is greatly interested in the outcome of this proceeding. While he has had extensive experience in radio, in attempting to explain away the results of the several tests made by the foregoing witnesses his testimony must be rejected as purely his professional opinion, based on the hypotheses of what the record showed had occurred during such tests. The results of the various tests made by Beshore also must be rejected, in view of his general lack of credibility, as hereinafter discussed. Certain tests were made for respondents by the only other witness called by them, one Peter D. Young. He is also of Kearney, Nebraska, a young electrical engineering student who holds television and radio-telephone licenses from the Federal Communications Commission and is the chief engineer of a television station in Kearney. He admitted that all his tests were made by him operating the receiver, while Richard Beshore, the son of respondent Paul S. Beshore, operated the transmitter. These tests were made on March 28 and 29, 1962, with two transmitters which Paul S. Beshore testified were production models. The tests for transmission distance or operational range were made both in and between buildings in Kearney, and also between automobiles in rural areas nearby. The tests in Kearney were made in locations having overhead electric or telephone wires. The automobile tests, as made,

required additional hookups and equipment, such as a coupler and a hookup of the transmitter with the car radio antenna. In the auto road tests, it is also noted, Young always operated the radio receiver, which he, as an expert, had specially tuned in for the reception of the transmitter signals from the other car. These tests, as well as tests made by him to determine field strength, have but little value.

Therefore, upon the weight and credibility of all the evidence, it is found that respondents' portable radio transmitter, the Radi-Vox in question, without the use of additional equipment thereon, or special local conditions such as electric wiring in houses or wires along the highway, has a satisfactory operational range, for use with radio receivers located in the home or other building, of not more than fifty feet in city, town, or commercial areas, or 75 feet in rural areas; and such device, without additional equipment, has a satisfactory operational range of no more than two city blocks when transmitting from one automobile to a radio receiver located in another auto. It is accordingly found that the first and second charges of the complaint have been sustained, and that, by the use of the statements contained in their advertisements, respondents have falsely and deceptively represented, directly or by implication, that their said portable radio transmitter, the Radi-Vox device, without the use of additional equipment, has a satisfactory operational range of up to one-half mile for every type of home radio receiver located in the home or other buildings, and that their said device, without the use of additional equipment, has a satisfactory operational range of up to ten miles when transmitting from an automobile to any automobile radio receiver in another automobile.

At the time counsel supporting the complaint filed their proposed findings, they also submitted an extensive brief on the law and evidence relating thereto, in which, among other

things, they pointed out with great particularity the numerous inaccuracies and weaknesses of respondents' evidence on the contested issues involving the first, second and fourth charges. Especially, they detailed the testimony of the witness David Ablowich, and ably analyzed it in contrast to the testimony of respondent Paul S. Beshore relating to the fourth charge, to which it was diametrically opposed. As already stated, when Beshore testified in Washington, D. C., on Januray 8, 1960, he stated (Tr. 54-55) that:

> "A. My understanding of the situation was that a Mr. Ablovitch (sic) who is an employee at the FCC Monitoring Station at Grand Island, came in to the plant, and I was not there, one of the employees gave Mr. Ablovitch (sic) two units. But he made the statement that he didn't know what he wanted to use them for. * * * They apparently were experimental units that were in our laboratory at the time Mr. Ablovitch (sic) from the FCC came in. * * * The way it was explained to me, was that there were no production units available to give to him.
>
> "Q. You have stated that these production models had a 10,000 micro forad (sic) antenna coupler; whereas, your regular sets have a 2500 micro forad? (sic)
>
> "A. That's right; it's micro forad. (sic)
>
> "Q. Antenna coupler?
>
> "A. That's right.
>
> "Q. What difference in field strengths would result from a transmitter having 10,000 farad antenna coupler?
>
> "A. It would be subtantially higher. * * *".

He also testified that the units respondents received back from the Federal Communications Commission after tests made by its experts Knight and Chapin, at Laurel, Maryland, "had 10,000 micro farad couplers" and that his field tests, made in January, 1957, of the Radi-Vox that has been advertised and sold by respondents, still obtain, since there has been no change in the device itself since that time,

although occasionally a field test is made of a model from the production line, the results of which do not vary from those of the tests made in January, 1957.

This particular part of Beshore's testimony was basically the reason for counsel supporting the complaint insisting upon taking the testimony of Mr. Ablowich, because if the Radi-Vox models tested by the Federal Communications Commission's experts were not regular production models, but were experimental models with four times the field strength of such regular production models, the results of those tests, as testified to by such experts, would be inapplicable herein, and would not tend to establish the fourth charge of the complaint, that respondents' device was powerful enough to require a license from that Commission. Respondents' emphatic opposition to the taking of Ablowich's testimony strongly indicates that respondent Paul S. Beshore knew that Ablowich would positively contradict him, as he later did, and reveal the facts that Beshore himself had been present at the factory when Ablowich visited it on February 6, 1957, and had delivered to Ablowich two regular production models of Radi-Vox taken from a regular shipping case (Tr. 239-241) for testing by the Federal Communications Commission. This is exactly what was shown by the testimony of Ablowich when it was finally taken. Ablowich further testified that Beshore sketched for him a rough circuit diagram of the device in question (CX 22). This diagram was referred to by Beshore in his letter (CX 23) hereinafter discussed. In Beshore's testimony he attempts to explain this diagram, stating it is not exact, but is "basically" correct.

Ablowich, an experienced electronics engineer, now with the Meteorology Department of the United States Navy, on February 7, 1957, was assistant engineer in charge of the Federal Communications Commission Monitoring Station at

Grand Island, Nebraska, not far from respondents' place of business at Kearney. Over many years he had frequently met and associated with respondent Paul S. Beshore in "ham" radio and various professional group activities. Commission's Exhibits 5 and 6 are photographs taken at such a meeting,, which show both Ablowich and Beshore standing near or next to each other. They were on more than friendly terms, and it is not "a" Mr. Ablowich, as stated by Beshore, but the Mr. Ablowich whom he knew intimately, and only reluctantly admitted knowing when recalled to the witness-stand in the course of the defense, after Ablowich had testified. This clearly demonstrates that respondent Beshore's claim or inference that he did not know Mr. Ablowich, or knew him only slightly, is completely false. Furthermore, Beshore's sworn statement that he was not present when Ablowich obtained the two devices alleged to be special experimental models was utterly incorrect, because a few days after Ablowich had visited respondents' plant, Beshore wrote a letter to Arthur A. Johnson, engineer in charge of the Federal Communications Commission Monitoring Station at Grand Island (CX 23), dated February 15, 1957, stating that he was transmitting three

> "additional sets of instruction sheets that we furnish with the Radi-Vox Radio-Talkie Device. We furnished two of these units to Mr. Dave Ablowich when he called on us February 6th, and also discussed the technical information with him. We also furnished a circuit diagram of the device for your information. * * * As I outlined to Mr. Ablowich, we use a Ferris instrument. * * * Mr. Ablowich left a copy of Document 9288, which we did not have * * *".

A true copy of this letter of Beshore's was received into the record by stipulation (CX 23) upon the Hearing Examiner's order of July 26, 1961, and, as already stated, Commission's Exhibit 22 is the "circuit diagram of the

device" which Beshore mentioned in said letter, and which was produced at the hearing in Los Angeles by witness Ablowich. Beshore, in his testimony given subsequently on October 18, 1961, while conceding that he had always been on friendly terms with Ablowich, denied the transaction of early February, 1957, as testified to by Ablowich. But he was hesitant and was not clear as to whether or, if so, when, he gave Ablowich the schematic diagram of the Radi-Vox (CX 22). And Beshore never did explain away, in his said testimony of October 18, 1961, and his later testimony of April 2, 1962, this letter of February 15, 1957 (CX 23), wherein he referred beyond question to his own personal dealing with Ablowich on February 6, 1957. Beshore testified that the two instruments which had been delivered to the Feedral Communications Commission were returned, and claimed that when he received them they contained interior couplers, which were "10,000 micro micro forad" (sic) couplers. This is certainly inconsistent with his said letter, which stated he had furnished "a circuit diagram of the device". Certainly Beshore would not transmit special units to the Federal Communications Commission for testing, and at the same time give Ablowich his own hand-drafted rough circuit diagram of a regular production model of the device.

Counsel supporting the complaint, in their said brief, have pointed out numerous other contradictions and weaknesses in respondent Beshore's testimony, which are unnecessary to detail here. Beshore's testimony is unreliable insofar as contradicted by the credible evidence of witnesses testifying in support of the complaint, and the reasonable and fair inferences drawn therefrom, as well as from his own letter (CX 23), and must certainly be rejected.

It is therefore clear, upon the weight and credibility of all the evidence, that the tests made at Laurel, Maryland, by the Federal Communications Commission's experts John

E. Knight and Edward W. Chapin were made on regular production models of the Radi-Vox device which Beshore himself had delivered to Ablowich at respondents' own plant, and not upon any "experimental" models much higher in field strength. Without extensively detailing the technical aspsects of the tests made, it is sufficient to quote from the summary of these experts' official report, as follows:

> "Laboratory tests indicate that the unt is in compliance with Part 15 if operated with the small antenna provided with the unit, but that it is not in compliance when used with large antennae as outlined in the operating instructions furnished with the unit."

In this connection, unquestionably a regular stock model of Radi-Vox sold to Dr. Vatterott, when tested by the witness Bourell, engineer in charge of the Kansas City Federal Communication Commission Monitoring Station in August, 1960, was also found to be in violation of that Commission's rules. Bourell testified that he found that its radiation limit

> "is far in excess of that permitted in Part 15 of the Commission's rules, while the instructions furnished with the Radi-Vox unit state that coverage up to several blocks may be obtained by connecting the antenna of the Radi-Vox to a wire antenna of 50 to 100 feet; and on the reverse side of the instruction sheet, in the last paragraph, it is stated, in spite of all these suggested hookups, the power radiated does not exceed legal requirements." (CX 19.)

In all of his tests Bourell used a frequency of 650 kilocycles, and found that when a 70-foot antenna was used, the device showed a signal strength measurement of 200 microvolts at a distance of 100 feet.

Respondents' advertising contains only the bald statements "No License Or Permit Required Anywhere" or

"No license needed." (CXs 6 and 7.) Part 15 of the Federal Communications Commission's current Rules, July, 1958, is in evidence (RX 7-C). § 15.208 thereof clearly requires a station license from that Commission for the operation of any low-power communication device which was manufactured after December 31, 1957, if such device exceeds the authorized radiation limit set forth in said Rules. The evidence shows that said Commission's Rules provide the following radiation limits: for 650 kilocycles of 36.9 microvolts per meter at 100 feet; 15 microvolts per meter at 190 feet; and for 950 kilocycles, 15 microvolts per meter at 165 feet. The evidence further shows that such limits were greatly exceeded by respondents' two devices when they were tested by the said two Federal Communications Commission experts during April, 1957, and by respondents' device tested by another such expert in August, 1960. There is substantial identity, insofar as the minimum field intensity requirement is concerned, between § 15.211 of said July, 1958 rules and the pertinent section of Part 15 of the Rules of that Commission which were in force when the tests of 1957 at Laurel, Maryland, were made by that Commission's experts Knight and Chapin. Respondents' device, when an extended wire antenna is used therewith, exceeds this minimum field intensity, and therefore requires a station license issued by the Federal Communications Commission in order to be operated legally.

From the great preponderance of the evidence, it must therefore be found that the fourth charge of the complaint has been amply sustained, and that respondents have falsely represented that their Radi-Vox device may be operated, under all conditions and circumstances, without a license.

Respondents' instruction sheet for the Radi-Vox (RX 11-A, -B), which sheet is entitled "Radio Talkie Broad-

caster", had been used for about two or two and one-half years before April 2, 1962: that is, at most, since late 1959. It has been changed from the one used by respondents before that time, according to Beshore's testimony wherein he stated, "[There are] very little [differences in the wording of the text]. * * * It is basically the same as it has always been. We have had to change it somewhat because of the change in rules of the Federal Communications Commission since the beginning * * *" (Tr. 365). While the product is the same, the name of the device is changed to only "Radio Talkie", which had been used somewhat in respondents' advertising as well as the name "Radi-Vox" to describe the instrument. In this later instruction sheet emphasis is land on the device's operation "in conformance with Part 15 of the FCC rules", etc., to support the preceding statement, "no license of any kind is required for the operation of the radio talkie". There follow other statements that the Federal Communications Commission's rules specifically permit a small transmitter of the type of respondents' device to "be operated with an antenna, including lead-in, not to exceed 10 feet in length", and that their device has a shorter antenna "even when used in a car", and, after emphatically warning the buyer to disregard information from anyone contrary to the foregoing statements, specifically tells the buyer:

> "Extra wires or extra antennas must not be connected to the Radio Talkie antenna. Any attempt to connect extra wires to the Radio Talkie antenna will result in the device being completely inoperative or result in ineffective short range operation."

These statements are not slight differences in the text from that of the earlier instruction sheet, as claimed by Beshore, but differ basically therefrom. As counsel supporting the complaint urge, this change unquestionably

demonstrates that respondents knew that their former recommended use of long antennas and extra hookups did violate the Federal Communications Commission's rules requiring a license for the device when so operated. Respondents have tacitly admitted such violation by this abrupt and radical change from their earlier instruction sheet, which was full of illegal "tricks", to use the word with which respondents beguiled the innocent public in their magazine advertisements. While respondents do not clearly or specifically contend that they have entirely abandoned all the practices complained of by so changing their instruction sheet, since it was adopted not earlier than the latter part of 1959, long after the complaint herein issued, and for other good reasons, the respondents have in no manner established a valid defense of abandonment of any of the practices charged and found herein to violate the Federal Trade Commission Act.

Upon the foregoing evidence the Hearing Examiner therefore makes the following

Conclusions of Law.

1. The Commission has jurisdiction of the respondents and of the subject-matter of this proceeding.

2. This proceeding is in the public interest.

3. The aforesaid practices of respondents, as herein found, were, and now are, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

Respondents have tendered a proposed order covering the first three charges of the complaint, which is identical to that contained in the previous vacated initial decision based on a consent agreement which was rejected by the

Commission. Since this proposed order, insofar as it relates to the first three charges, is based upon respondents' untenable theory that these three charges were not properly in litigation herein, it must be rejected, as must also that portion thereof dismissing the complaint as to the fourth charge. The proposed order submitted by counsel supporting the complaint is somewhat vague and repetitious, and therefore the Hearing Examiner, while accepting the basic principles thereof, has adopted it only in part and in substance. Accordingly,

It Is Ordered that respondents Western Radio Corporation, a corporation, and its officers, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their portable radio transmitter designated as "New Magic Walkie Talkie", "Radi-Vox" and "Radio Talkie", or any other portable radio transmitter with the same or substantially the same transmitting power, or any other similar product, whether designated under said name or names, or any other name, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

1. That said portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of up to one-half mile for reception by home radio receivers, or that said device without additional equipment has an operational range of any specified distance in excess of fifty feet in city, town or commercial areas or seventy-five feet in country or rural areas;

2. That said portable radio transmitter, without the use of additional equipment, has a satisfactory oper-

ational range of from one to ten miles when transmitting from an automobile or other moving vehicle to a radio receiver in another vehicle, or representing directly or by implication that said device, so used, has a range of any distance in excess of two city blocks;

3. That any product is guaranteed unless the terms and conditions of such guarantee and the manner and form in which the guarantor will perform are clearly and conspicuously set forth, including the amount of any service or other charge which is imposed;

4. That no license or permit is required for any operational use of said device, unless the specific conditions under which such license or permit would be required are clearly and conspicuously set forth in immediate conjunction therewith.

Loren H. Laughlin,
Hearing Examiner.

July 25, 1962.

APPENDIX B.

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of Western Radio Corporation, a corporation, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation	Docket No. 7468

ORDER MODIFYING INITIAL DECISION AND PROVIDING FOR THE FILING OF OBJECTIONS TO PROPOSED FINAL ORDER AND REPLY.

This matter having been heard by the Commission upon the exceptions of respondents to the initial decision and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having ruled on said exceptions and having determined that the initial decision as modified and supplemented by the accompanying opinion shall be adopted as the decision of the Commission and that the order should be modified to conform to the views expressed in our opinion:

It Is Ordered that respondents may, within twenty (20) days after service upon them of this order, file with the Commission their objections to the changes in the order to cease and desist contained in the initial decision as shown by the following proposed order of the Commission, together with a statement of the reasons in support of their objections and a proposed alternative form of order appropriate to the Commission's decision.

Proposed Order.

It Is Ordered that respondents Western Radio Corporation, a corporation, and its officers, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their products, including radio transmitters, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That their transmitters with or without the use of additional equipment have a satisfactory operational range of any specified distance unless respondents establish that their devices in fact have the operational ranges specified.

(b) That no license or permit is required for any operational use of their radio transmitters unless the specific conditions under which such license or permit would be required are conspicuously set forth in conjunction therewith.

(c) That any product is guaranteed unless the terms and conditions of such guarantee are clearly and conspicuously set forth, including the amount of any service or other charge which is imposed.

It Is Further Ordered that counsel in support of the complaint may, within ten (10) days after service upon him of respondents' memorandum or brief, file a reply thereto.

It Is Further Ordered that the initial decision, as modified and supplemented by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

By the Commission.

Joseph W. Shea,

Seal *Secretary.*

Issued: June 12, 1963.

APPENDIX C.

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of
Western Radio Corporation,
a corporation, et al.
} Docket No. 7468

OPINION OF THE COMMISSION.

By MacIntyre, Commissioner:

This case is before us on respondents' exceptions to the initial decision and order to cease and desist entered by the hearing examiner. The complaint charges that respondents violated Section 5 of the Federal Trade Commission Act by misrepresenting the effective range, without additional equipment, of their pocket-sized portable radio transmitter and the guarantee attaching to the product, and by falsely claiming that no Federal Communications Commission license was required to operate the device.

Respondent Western Radio Corporation of Kearney, Neb., and the individual respondents are engaged in the manufacture and distribution of various electronic devices, including intercommunications sets and broadcast

receivers, as well as the portable radio transmitter which is the subject of this proceeding. The respondents advertise in magazines of national circulation and maintain a substantial course of trade between Nebraska and other states.

Respondents' transmitter, which has been sold under the names of "Radi-Vox," "New Magic Walkie Talkie" and "Radio Talkie," was sold for twelve to thirteen dollars in the period 1957-1958. The Radi-Vox, which operates in the lower part of the standard broadcast band, is a small unit designed to be held in the hand. It consists of a transistor supplied by a six volt battery. An antenna provided with the transmitter has a length of sixteen and one-half inches when fully extended.

Respondents take exception to the examiner's disposition of the proceeding on the ground that certain crucial findings are not supported by substantial evidence and that consequently the provisions of the order based thereon cannot be justified. Respondents also contend they were denied a fair hearing by the examiner's refusal to permit them to inspect and possibly use in cross-examination the Final Report, dated September 15, 1958, of Charles T. Snavely, a Commission attorney examiner who testified in this proceeding.

Before examining the contentions of the parties and the findings of the examiner in detail it is worth noting that respondents' counsel does not except to the order entered below in its entirety. On oral argument respondents' attorney stated that respondents objected to the requirement that they refrain from representing that their device, without additional equipment, has an operational range in excess of fifty feet in cities, towns and commercial areas, and seventy-five feet in country or rural areas, or that the operational range of the device from one moving vehicle to another is a distance in excess of two city blocks

without the use of additional equipment. Respondents' counsel conceded on oral argument that he did not quarrel with the order's prohibitions against the representation that the portable radio transmitter in question had a satisfactory operational range of up to one-half mile without additional equipment and the claim that the device without additional equipment had a satisfactory operational range from one to ten miles when transmitting from a moving vehicle to a radio receiver in another vehicle.

Respondents' counsel concedes forthrightly that paragraph 3 of the examiner's order, which prohibits representations that a product is guaranteed, unless the provisions of the guarantee, including service or other charges, are clearly set forth in conjunction therewith, represents a reasonable exercise of the Commission's powers and he does not except to this provision.

Respondents object to paragraph 4 of the order *in toto* on the ground that it is not supported by the evidence. That prohibition requires respondents to cease and desist from representing that no license or permit is required for any operational use of the device unless the specific conditions under which such license or permit would be required are clearly set forth in conjunction with such a claim.

The issues we must resolve on respondents' exceptions are, therefore, narrowed to three primary questions: (1) Does the record sustain an order prohibiting representations that the effective range of the transmitter without additional equipment is in excess of fifty feet in cities or seventy-five feet in rural areas and two city blocks when transmitting from one automobile to another; (2) whether respondents should be required to cease and desist from representing that no license or permit is required for any operational uses of the device unless the specific condi-

tions under which such license would be required is clearly set forth in conjunction with such claim; and (3) the procedural question of whether respondents should have been given access to the Final Report of the Commission's attorney examiner testifying in this proceeding.

We first turn to the examiner's findings on the effective operational range of respondents' device without the use of additional equipment and the record evidence relating to those findings. To support that aspect of the case, counsel supporting the complaint adduced testimony of the operational capabilities of transmitters secured from two of respondents' customers, namely, John E. Mair of Kansas City, Mo., and Dr. Paul Vatterot of Creve Couer, Mo.

Mr. Mair testified that he followed the instructions included with respondents' transmitter and that he was unable to make the device work. There was also testimony from Robert W. Hester, engaged in the television repair business in Kansas City, that he and Charles Snavely, the Commission's attorney examiner, ran some preliminary tests on Mr. Mair's set. In the tests made by Hester, respondents' device did not work except when an additional carrier wire was added to the transmitter.

The Mair transmitter was then tested by a Mr. Donald Day, also of Kansas City and vice-president of Television Service Engineers in Kansas City, a trade association. This expert had been recommended by Hester as more qualified to thoroughly test the equipment on the basis of his experience with transmission and receiving equipment.

Day, apparently contrary to Mair and Hester, was able to get a readable transmission from the Radi-Vox, although nowhere near the maximum distances claimed in respondents' advertisements and circulars.[1] A meaningful

1. "Broadcasts To Any Home or Car Radio Without Wires or Hook-Ups! . . . "Talk to Your Friends Up To A Block Or More Away! Talk up to I mile or more between two automo-

finding on the capabilities of the transmitter, purchased by Mr. Mair, must therefore be made solely on the basis of Day's testimony, and we do not rely in any respect on the testimony of Messrs. Mair, Hester and Snavely in resolving the substantive issue, namely, the effective operational range of respondents' transmitter. Day tested respondents' device in both an urban and a rural area using both a standard automobile receiver and a special communications receiver, the Hammurland HQ-129, which, according to the witness, is not normally in the hands of the average radio listener. In the city, under normal operating conditions of noise, the maximum range of transmission without alteration of the transmitter as received by the special receiver was forty feet. Under quiet conditions in a suburban location the maximum range of the transmitter without attachments, for a barely intelligible reading by the Hammurland equipped with one hundred feet of aerial, was 350 feet. When the witness used the ordinary auto radio under normal noise conditions, he was able to receive a satisfactory signal at a distance of only twenty feet. In a quiet zone the automobile receiver, to which a one-hundred-foot aerial was attached, received a signal from the transmitter at a distance of seventy-five feet.[2] The witness concluded, on the basis of the tests he had made, that communications between cars up to a mile or more or between houses a block or more away would be possible only under special conditions, if at all.

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biles. . . ." (CX 6 and CX 7.) "Talk to all houses and car radios everywhers! . . . No wire connections required! . . . Normal Range Up To ½ Mile . . . Talk From Car To Car Up to 1-10 Miles Apart. . . . Between Buildings Up To ½ Mile Or More. . . ." (CX 13-A.) "Sends Your Voice To Any House Or Car Radio! No connections, Wires Or Electric 'Plug In' Works everywhere—Up To ½ Mile Or More! . . ." (CX 13-B.)

2. In his testimony Day gives a figure of "approximately 40 feet." (Tr. 123-24.) For the purposes of this decision we will accept the longer distance of 75 feet given in his written report. (CX 12.)

Respondents attack the findings made by the hearing examiner in reliance on Day's tests on the ground that the set used was obviously defective.[3] The argument is without merit for it has no support except respondent Paul Beshore's speculation on the failure of Messrs. Mair, Hester and Snavely to operate the device successfully. The fact is, however, that respondents' instructions specify the transmitter with its built-in antenna will operate over a distance of twenty-five to 300 feet, depending upon the sensitivity of the receiving radio and location. The test results achieved by Day, which have already been noted, were within or very close to those limits. In fact the reading at 350 feet which may be ascribed to the above-average sensitivity of the Hammurland radio with the extra one-hundred-foot aerial attached exceeded the performance standard envisaged by respondents' instructions although not equalling the challenged claims in their advertisements. In view of these facts Beshore's testimony that the set was damaged is conjectural and entitled to little weight, and Day's testimony, therefore, constitutes a valid foundation for findings by the examiner or the Commission.

The hearing examiner also relied on testimony relating to the operational range of a transmitter secured from Dr. Paul Vatterot. Dr. Vatterot testified that several attempts were made to transmit messages from his automobile to another driven by his brother-in-law on a trip. The Radi-Vox on that occasion, according to this witness, worked

3. Respondents rely on Mair's testimony that the only sound he could get from the transmitter was a squeak when he touched the antenna of the device with that of a radio (Tr. 84); Hester's testimony that he could get no intelligible sound from the device (Tr. 115); Snavely's testimony that he could get no sound from the transmitter; Day's answer during cross-examination that the transmitter may have been damaged (Tr. 128); and the testimony of respondent Paul S. Beshore that the foregoing testimony shows that the Mair transmitter was obviously defective and may have been damaged in the mails. (Tr. 295-299.)

when the cars were fifty feet apart but not when they were one or two blocks apart. The same witness testified that he was unable to make the device work satisfactorily in his office, although the distance between transmitter and receiver was only twenty-five feet in that experiment. At home Dr. Vatterot found that the transmitter would not work in excess of fifty feet from the receiving ratio. The same set was subsequently tested by Harold W. Bourell, the engineer in charge of the Kansas City Federal Communications Office, for compliance with that agency's licensing rules. Incidental to that test he found that with its antenna fully extended the voice modulation of the Radi-Vox was fairly clear and could be understood when the transmitter was six feet from the receiving radio, but that at ten feet it was too weak and distorted to be understood and could not be heard at all beyond fifteen feet.[4]

Respondents evidently do not dispute that the Vatterot transmitter was operational but argue that Vatterot's experience should be discounted on the ground that he had not followed the instructions accompanying respondents' device which specify hooking a coupling device to the transmitter. The coupling device, described in the instructions, is an adaptor which will connect the Radi-Vox to the automobile antenna; it is not furnished with the transmitter, but may be purchased for $3.95 from respondents or made by the purchaser from standard parts.[5] But respondents' contention is without merit because they initially advertised that the promised operational range could be obtained without additional wires and hook-ups and therefore the fact that Vatterot did not hook up the coupling device suggested by the instructions in his transmission attempts from one vehicle to another does not invalidate his testimony. Respondents further argue that Dr. Vatterot had

4. CX 19.
5. CX 16.

not used the transmitter in accordance with instructions furnished with the set because he had not turned up the radio in his office to its maximum volume. Vatterot, during cross-examination, admitted that he had not turned the radio up to its maximum volume because he did not want the radio blaring in his office. Vatterot's failure to turn up the volume of his radio was immaterial, respondents' circular claims that its device would "Break In Regular Radio Broadcasts!" It should be unnecessary to point out that the public does not receive "regular radio broadcasts" with their receivers turned to maximum volume. Respondents' instructions after the sale therefore qualify in a material respect one of the initial representations inducing purchase of the product.

Respondents presented rebuttal evidence on the operational range of their transmitter, namely, the testimony of a Mr. Peter Young, who ran certain tests on their device. Respondents charge that the hearing examiner erroneously rejected this evidence. The contention is without merit. The tests made by Young on the transmission capabilities of the device from one vehicle to another are irrelevant, as the examiner found, since they were made with an additional hook-up to respondents' transmitter. The issue here involved is the operational capability of the unit without additional equipment. In the case of the test relating to the device's transmission to home receivers, Young admitted that the home receiver used in the test was connected to an extension antenna as recommended in the instructions. We note again, in this connection, that respondents represented without qualification that the device would broadcast to any home or car radio without wires or hook-ups. This all-embracing claim necessarily represented also that no additional wires or hook-ups are required with respect to the receiving set. Young's test on the transmitting range of the Radi-Vox to home receivers clearly is not

relevant to the issues presented by the complaint, namely, the operational capabilities of the unit without the installation of additional equipment. In fact, Young's tests are not pertinent to the issues presented except insofar as they show that even with additional equipment the Radi-Vox's operation does not equal the maximum claims made for the device in the advertisements under consideration here.[6]

On reviewing the evidence, we are convinced that the record supports the finding that respondents have misrepresented the effective operational range of their transmitter. Even respondents do not in their exceptions argue that their transmitter without additional equipment could transmit to home receivers up to one-half mile away or from a moving vehicle to another at distances of up to ten miles as represented in their advertising claims. The remaining question on this issue, therefore, concerns the proper remedial measures which should be adopted to preclude further deceptions of this nature. On this record, we are forced to conclude that the maximum operational capability of the device is extremely low. Under urban conditions without the use of additional equipment the record evidences reception by radios at distances ranging from six, twenty, forty, and up to a maximum of fifty feet from the transmitter. Day, in a rural area, recorded transmissions at distances of 350 feet to the Hammurland receiver and seventy-five feet to an ordinary car radio when an aerial of one hundred feet was attached to these receivers. Day's results in the rural area, it may be concluded, in fact exceeded the effective operational range of the device without the use of additional equipment.

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6. Young testified that his test results included reception by a home receiver at a distance of 2½ blocks, and transmissions of ½ block to 3 or 4 blocks in the city of Kearney, and 3 to 5 miles in the country in the case of the automobile tests. (Respondents' brief, p. 16.) Compare with the advertising claims set forth in note 1, *supra*.

The order submitted by the hearing examiner in effect gives respondents the license to claim distances in excess of their transmitter's operational capacity by the prohibition of representations that the unit, without additional equipment, has an operational range of any specified distance in excess of seventy-five feet in country or rural areas. The provision in the hearing examiner's order requiring respondents to cease from representing that the device, without additional equipment, when transmitting from an automobile or other moving vehicle to a receiver in another vehicle, has a range of any distance in excess of two city blocks is not supported by the evidence. The relevant evidence does not show that the Radi-Vox without additional equipment will in fact satisfactorily communicate to a vehicle two blocks away. The only pertinent testimony on this point is that of Dr. Paul Vatterot, who testified, as the hearing examiner found, that the Radi-Vox worked when the cars were fifty feet apart but that the transmission was inaudible when the distance between the vehicles increased to one or two blocks.

We conclude that the order entered below should be modified by deleting therefrom paragraphs 1 and 2, which require respondents to refrain from representing that their transmitters without additional equipment have operational ranges in excess of the distances specified therein, eg., fifty feet, seventy-five feet or two city blocks, etc. The record here warrants a broader prohibition precluding assertions in any manner misrepresenting the effective operational range of Western Radio's transmitters. Respondents will therefore be prohibited from representing that their transmitters have any specified operational range unless they are able to establish that their device can effectively operate over the distance claimed. Requiring respondents to ensure the accuracy of their advertising claims in this manner is necessary to preclude further

misrepresentation and exaggerations about the merits of their product of the nature documented by the record. This prohibition has the further advantage of flexibility permitting respondents to adapt their advertising claims to changes in the product provided that they establish the veracity of their claims. The requirement that respondents establish the validity of their representations on the operational range of their transmitter clearly delineates Western Radio's obligations under the order. The task of respondents of complying with the order and the duty of the Commission to enforce compliance will therefore be facilitated.

Furthermore, the order should not be limited merely to misrepresentations of the effectiveness of the transmitter made in conjunction with the representation that no additional equipment is required. The order will be amended to cover any possible misrepresentation respondents might make as to the effective range of the Radi-Vox whether or not such claims are made in conjunction with a recommendation for the use of additional equipment. The order should not be limited merely to the precise misrepresentations brought to light in this proceeding but should be broad enough to encompass any deceptive statement reasonably related to the false advertising claims evidenced by this record.

We turn now to respondents' exception to the examiner's finding they falsely represented their Radi-Vox device may be operated under all conditions and circumstances without a license. The Federal Communications Commission regulations pertinent to a consideration of this issue are contained in Part 15 of that agency's rules entitled "Incidental and Restricted Radiation Devices Subpart E Low Power Communication Devices."[7] These regulations,

7. 47 C. F. R. § 15.201 *et seq.* (1958).

which require a license for operation if the device's radiation exceeds the permissible limits stated therein, are designed to prevent interference with authorized radio services.[8] The record evidence relating to respondents' representations on the licensing requirement pertains to the period 1957-1958. In this connection we note that although the rules in effect in 1957 underwent certain revisions in the following year, these changes are not relevant to the questions presented by this proceeding, since the minimum field intensity requirement remained substantially unchanged.

The testimony of Messrs. Knight and Bourell is ample to demonstrate the falsity of respondents' unqualified representation, "No license needed."[9] Mr. Knight is an electronic scientist employed by the Laboratory Division of the Federal Communications Commission, where he is primarily concerned with radiating devices and the measurement of the intensity of their radiating field to determine whether they are in compliance with the rules and regulations of the Commission. His report, dated April 16, 1957, categorically states that although the Radi-Vox was in compliance with Part 15 of the Federal Communications Commission's rules then in effect, if operated with the small antenna provided, it would violate the rules when used with the large antennas suggested in the operating instructions furnished with the unit.[10]

Respondents have apparently abandoned the contention strenuously urged during the trial of this proceeding, that

8. The hearing examiner found, and no exception is made to the finding, that the radiation limits provided by the Federal Communications Commission's rules were as follows: for 650 kilocycles 36.9 microvolts per meter at 100 feet; 15 microvolts per meter at 190 feet; for 950 kilocycles 15 microvolts per meter at 165 feet.

9. CX 6 and CX 7, Advertisements in *Popular Science*, January 1957 and July 1958.

10. CX 3.

the tests were not relevant in view of the fact that the Federal Communications Commission had not tested respondents' regular production device but rather an experimental model with stronger radiation characteristics. The examiner resolved the conflict of evidence on this point between respondent Paul Beshore and the Commission's witness, David Ablowich, a former employee of the Federal Communications Commission, in favor of the latter, finding in fact that the Federal Communications Commission had secured two of respondents' regular production models for the purpose of these tests.

Respondents now contend that the tests made by Knight should be disregarded on the ground that in December 1957 an external antenna coupler was added to the Radi-Vox transmitter, which substantially reduced radiation and brought the transmitter into compliance with new F. C. C. regulations on low powered communication devices which had become effective on January 1, 1958. In this connection respondents further claim that the coupler in question was added to the operating equipment approximately fourteen months prior to the issuance of the complaint herein. The evidence shows that respondents unqualifiedly claimed their device did not require a license when in fact use of the transmitter with an outside aerial as suggested by their instructions violated the Federal Communications Commission's rules in effect at the time the test was made, namely, April 1957. Under any circumstances, respondents' apparent claim of abandonment of the violation of F. C. C. rules some nine months after it was found out by that agency is not a valid bar to Commission action here with respect to respondents' misrepresentations. Moreover, the record indicates that even by the middle of 1958 respondents had failed to bring their device and representation into compliance with F. C. C. rules.

Also tested for compliance with Federal Communications Commission rules and licensing requirements was the transmitter purchased by Dr. Paul Vatterot in July of 1958 in response to respondents' advertisement in the July 1958 *Popular Science*, which represented without qualification that no license was needed in connection with the operation of the transmitter. These tests were conducted by Harold Bourell, the engineer in charge of the local Federal Communications Commission office in Kansas City, Mo. He testified that the unit, if used with the antenna attached to the device, would comply with Part 15 of the Federal Communication Commission's rules relating to incidental and restricted radiation devices, but that, if the unit were used with some of the lengths of wire and connections listed in the instruction sheet, measurement of radiation under these conditions did not comply with the Commission's rules.[11] In this connection, the witness stated specifically that the addition of a seventy-foot antenna would make the intensity exceed the radiation limits permitted under Part 15.

Respondents attack the validity of Bourell's test on several grounds. Respondents argue that it is inexplicable that Bourell got a result within permissible limits when the seventy-foot antenna utilized was grounded but exceeded the permissible radiation when using the same antenna with the ground disconnected. In their exceptions respondents also argue that the high reading in the tests was due to the fact that Bourell's test antenna was connected to the same post to which was connected a large amateur antenna belonging to the witness. Respondents rely on the testimony of Paul Beshore to the effect that the presence of Bourell's amateur antenna would increase the capacity between

11. The operating instructions to which the witness referred suggested outside aerials of any type, as well as specifically suggesting lengths of fifty to a hundred feet of antenna wire. (CX 16.)

the amateur antenna and the seventy-foot wire resulting in an electrical length several hundred feet long. Respondents' exceptions fail to take note of Mr. Bourell's explanation that the amateur antenna on the post, although in close proximity to the test antenna, did not produce an unusual reading. The witness, on cross-examination elicited by respondents' counsel, expressly stated that such would not be the effect because of the tremendous difference in the wave lengths of the amateur antenna and the unit tested.[12] We find credible Bourell's explanation that the reason the seventy-foot antenna had a stronger signal with the ground removed was that at this length the ground showed an absorption of the signal and that this may have been due to some resonance at that particular frequency. The witness stated that he had made these measurements four different times with two meters to make sure they were correct.

Mr. Bourell's testimony on this point convinces us that his measurement of intensity with the seventy-foot antenna attached to respondents' device was accurate and his statement adequately answers the rhetorical question in respondents' brief, "Why should disconnecting the ground so drastically increase the radiation?" In the conflict between Mr. Bourell and respondent Paul Beshore we are inclined to give credence to Bourell's testimony on these points. The hearing examiner stated in detail his reasons for not finding the testimony of Mr. Beshore credible as a general matter. Furthermore, of the two witnesses, Bourell, on the basis of the record, is the better qualified in the measurement of field intensities. Finally, Bourell, unlike Beshore, had no direct interest in the outcome of this proceeding.

Further evidence of the falsity of respondents' unquali-

12. The witness explained that the amateur antenna was resonant at 14 megacycles, 14,000 kilocycles, and therefore was very short in comparison to the resonant frequency at 650 kilocycles, which was the frequency of respondents' device. (Tr. 218.)

fied representation that no license is required in connection with the operation of its device is the change in the text of the instructions accompanying the Radi-Vox transmitter. In the amended instructions, issued apparently in the latter part of 1959, purchasers were warned that connecting additional wires to the transmitter's antenna would make the device inoperative or ineffective. We agree with the examiner that this radical change in the operating instructions constitutes a tacit admission that the former recommended use of long antennas and extra hook-ups violated the Federal Communications Commission's rule requiring a license for the device when operated in this manner.

Respondents object that the examiner erroneously rejected the tests of respondent Beshore and Mr. Young on the field strength or radiation characteristics of the Radi-Vox. From our review of the record, we are convinced that the examiner decided the issue correctly. He explained in detail his reason for finding that Beshore's testimony was lacking in credibility, and we see so reason for disturbing that conclusion. Young testified that, when used in accordance with respondents' amended instructions, the unit complies with the Federal Communications Commission's regulations. His test results, however, do not serve to rebut the findings of the Federal Communications Commission employees, Knight and Bourell. The total length of antenna and transmission line attached to the Radi-Vox in Young's test did not exceed ten feet; the antenna used, therefore, fell short by a substantial margin of the fifty to one-hundred foot length suggested by respondents' instructions effective in the period relevant to this proceeding when they made the "No licensing required" claim which is challenged here. In fact, respondents' former instructions further suggested that outside aerials of any type be utilized with no limitations specified as to the length of the antenna.

Respondents take exception to paragraph 4 in the order entered below on the ground that they should not be required to disclose in their advertising modes of operation of their device which will violate the Federal Communications Commission's licensing regulations since their present instruction sheet does not recommend any uses which would require a license. In this exception respondents ignore the fact that they are not required to represent that no license is required in connection with the use of their device. However, if respondents desire to make representations of this nature they may be required to reveal the conditions under which operation of the device without a license would violate the law. Affirmative disclosure may, of course, be required by the Commission in those instances where a claim is misleading unless facts material in the light of such representations are stated in conjunction therewith. *Manco Watch Strap Co., Inc., et al.*, Docket No. 7785 (1962). As the Supreme Court has stated, "those caught violating the Act must expect some fencing in." *Federal Trade Commission* v. *National Lead Company, et al.*, 352 U. S. 419, 431 (1957). Furthermore, there is, of course, no assurance that respondents will not at some time in the future again change their instructions or issue different instructions with another device resulting in the same type of misrepresentations with which we are faced here.

Moreover, respondents have already been advised with considerable force and clarity of the need for affirmative disclosure of the type required by the order entered below. By letter dated April 24, 1957, the Federal Communications Commission, the agency directly concerned, advised respondents:

> The [Federal Communications] Commission is charged with the responsibility of enforcing its Rules to prevent radio and television interference and your cooperation is desired. Please advise this office at an

early date what steps you are taking to warn users of the Radi-Vox units that operations with aerial wires may result in excessive radiation for which severe penalties are provided by the Communications Act of 1934, as amended.

Respondents also raise the procedural issue that they were denied a fair hearing since the hearing examiner did not permit them to examine a so-called "Final Report" referred to by the Commission's attorney examiner, Charles T. Snavely, when he testified in the hearing of March 29, 1960. Snavely's testimony does not go to any of the substantive issues raised in this proceeding. As Commission counsel stated during the course of the hearing, his testimony was taken for the purpose of continuity, namely, to prove that the transmitter tested by Messrs. Hester and Day was in fact secured from respondents' customer, John Mair. On examining the record we have determined that Snavely's testimony is not even required for that limited purpose and we have not relied upon it.[13] Respondents do not suggest anywhere in their exceptions that the Mair transmitter, identified as CX-2, was not the one tested by Mr. Day. Furthermore, even assuming for the moment that Snavely's testimony is required to bridge the transition of the transmitter from Mair to Hester, the fact remains that the particular report requested by respondents would have been of no utility in cross-examining Snavely on the subject. The report in question is simply a skeletal memorandum of transmittal consisting of one page, forwarding one of respondents' transmitters and list-

13. Respondents' customer, Mr. Mair, identified Commission Exhibit, for identification No. 2, as the transmitter he received from respondents. (Tr. 83.) Mr. Hester testified that Snavely came to him with the device "which was this Radi-Vox I believe it's called. . . ." (Tr. 115.) From the record as a whole it is clear that the device with respect to which Hester testified was in fact the transmitter purchased by Mair. Furthermore, Day testified that the transmitter in question was given to him by Hester for purposes of testing. (Tr. 121.)

ings the field reports submitted.[14] The report, confined to administrative matters, could not possibly be the basis for impeachment of Snavely as respondents suggest in their exceptions. Respondents, therefore, have not been subjected to any disadvantage by the withholding of this report. In view of our holding that Snavely's testimony was not necessary to lay the foundation for the testimony of Messrs. Hester and Day and our further holding that access to the report in question would in any case have been of no help to respondents in the cross-examination of the witness, discussion of the applicability of either the rule of *Jencks* v. *United States*[15] or the Jencks statute[16] to this proceeding would be superfluous.

We have already noted the necessity of revising the order entered below to preclude any misrepresentation by respondents of the operational range of their transmitters. The order should be modified in two other respects. The scope of the order relating to claims on the operational range of respondents' transmitters and the lack of licensing requirements should be broadened to encompass respondents' representations in connection with any transmitter. That provision of the order relating to guarantee claims should be made applicable to any product sold by respondents. Unlike the other deceptive claims considered in this proceeding, the proper remedy for misrepresentation of a guaranty is not peculiar to radio transmitters.

Respondents' exceptions, except as noted, are denied. The initial decision, as modified and supplemented by the findings in this opinion, is adopted as the decision of the Commission.

June 12, 1963.

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14. Respondents' counsel, on oral argument, although not waiving the claim of error, stated he had no objection to inspection by the Commission of this document.

15. 353 U. S. 657 (1957).

16. 18 U. S. C. § 3500.

APPENDIX D.

UNITED STATES OF AMERICA.

Before Federal Trade Commssion.

Commissioners:

Paul Rand Dixon, Chairman,
Sigurd Anderson,
Philip Elman,
Everette MacIntyre,
A. Leon Higginbotham, Jr.

In the Matter of Western Radio Corporation, a corporation, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation.	Docket No. 7468.

FINAL ORDER.

Pursuant to § 4.22(c) of the Commission's Rules of Practice, in effect prior to August 1, 1963, respondents were served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of order which the Commission contemplates entering; and

Respondents having made timely filing of their exceptions to the order proposed which were opposed by a reply filed by counsel supporting the complaint and the Commission upon review of these pleadings having determined that respondents' exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

It Is Ordered that respondents Western Radio Corporation, a corporation, and its officers, and Paul S. Beshore and W. P. Beshore, individually and as officers of said cor-

poration, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of their products, including radio transmitters, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That their transmitters with or without the use of additional equipment have a satisfactory operational range of any specified distance unless respondents establish that their devices in fact have the operational ranges specified.

(b) That no license or permit is required for any operational use of their radio transmitters unless the specific conditions under which such license or permit would be required are conspicuously set forth in conjunction therewith.

(c) That any product is guaranteed unless the terms and conditions of such guarantee are clearly and conspicuously set forth, including the amount of any service or other charge which his imposed.

It Is Further Ordered that the initial decision, as modified and supplemented by the Commission's opinion, be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order set forth herein.

By the Commission.

Joseph W. Shea,
Secretary.

(Seal)

Issued: September 25, 1963.

APPENDIX E.

UNITED STATES OF AMERICA.

Before Federal Trade Commission.

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of
Western Radio Corporation,
a corporation, et al.

Docket No. 7468.

OPINION ON RESPONDENTS' EXCEPTIONS TO THE PROPOSED ORDER.

By MacIntyre, Commissioner:

On June 12, 1963 the Commission issued its opinion and proposed order in this matter requiring respondents to refrain from misrepresentating the operational range of their radio transmitters, from representing that no license is radio transmitters, from representing that no license is necessary in the operation of their devices unless the conditions under which a license or permit would be required are clearly set forth in conjunction therewith, and finally from making deceptive claims on the guarantees attaching to their products.

This matter is now before us on respondents' objections to the proposed order and complaint counsel's answer thereto. Respondents contend that the order is too

broad because it is not confined to precisely those deceptive claims they have made in the past but also covers possible allied and related misrepresentations. They also object the order is defective in that it is not confined to the particular transmitter with respect to which evidence was adduced below. These contentions require no extended discussion; respondents are here advancing an argument which can no longer be seriously entertained.[1]

Respondents also take exception to the provision in Paragraph (a) of the order requiring them to refrain from making representations that their transmitters have a satisfactory operational range of any distance, unless they establish that their devices in fact have the capabilities specified. In this connection respondents state, in pertinent part:

> "Paragraph (a) of the modified order is too broad and is confusing in that it confines respondents in future advertising claims to stating only those specific distances in operational range which they have established their transmitters possess. This provision not only requires that advertising claims be not deceptive but also that their truthfulness be shown or proven to some unidentified persons . . ."

Requiring respondents to establish the validity of their advertising claims on the effective range of Western Radio's transmitters should cause no undue hardship, assuming such representations are made in good faith. Unless there is a demonstrable factual basis for their representations on this point, the veracity of respondents' claims

1. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470 (1952); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946); *Niresk Industries, Inc., et al.* v. *Federal Trade Commission*, 278 F. 2d 337 (7th Cir., 1960), cert. denied 364 U. S. 883 (1960); *Maryland Baking Company* v. *Federal Trade Commission*, 243 F. 2d 716 (4th Cir., 1957); *Hershey Chocolate Corporation* v. *Federal Trade Commission*, 121 F. 2d 968 (3rd Cir., 1941).

would at best be subject to the vagaries of happenstance. The necessity for placing such a burden on respondents is amply supported by their past exaggerations of the merits of Western Radio's transmitters documented by this record.

Before turning to respondents' other objections, it may be in order to clarify their duties under Paragraph (a) of the order and the manner in which this proviso is to be administered. Respondents need not volunteer experimental or other data prior to each advertisement, nor need they submit each advertisement to the Compliance Division prior to publication. Respondents are required, however, to have at hand and to furnish to the Commission upon demand complete data supporting any advertising claims on the operational ranges of their transmitters. In general, such requests will be initiated by the Commission's Compliance Division.

Respondents' objection that the Compliance Division does not have the facilities for scientific testing or evaluation of data supporting respondents' claims is without merit. The Compliance Division, of course, whenever circumstances so require, may solicit the technical assistance of other government agencies or of scientists or engineers employed by private organizations.

The argument that it is an unlawful delegation of the Commission's powers to require evaluation by its staff of the data relied upon to establish the veracity of respondents' advertising claims is patently without foundation. Obviously, as a practiacl matter, the day to day burdens of the enforcement of Commission orders are initially borne by its staff. Equally groundless is the assertion that there would be no recourse to the Commission from the Compliance Division's evaluation of the data submitted to document the validity of respondents' repre-

sentations on their devices' capabilities. Moreover, under Rule 3.26(b) of the Commission's Rules of Practice effective August 1, 1963, respondents are explicitly given the privilege of requesting the Commission's advice whether any contemplated course of action will constitute compliance with an order. As in the past, respondents have the opportunity for informal consultation with the Compliance Division to facilitate adherence to the terms of the order. Furthermore, the staff of the Compliance Division will, on respondents' request, advise on the type of data required under Paragraph (a) of the order to substantiate respondents' advertising claims of transmitter capabilities.

Respondents' objections to the proposed order issued June 12, 1963 are rejected, and it will be adopted as the final order of the Commission.

September 25, 1963.

APPENDIX F.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

No. 14405 September Term, 1964 September Session, 1964

Western Radio Corporation, a corporation, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, *Petitioners,* *vs.* Federal Trade Commission, *Respondent.*	Petition to Review an Order of the Federal Trade Commission.

November 23, 1964.

Before HASTINGS, *Chief Judge,* KNOCH and KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is a petition to review and set aside a cease and desist order of the Federal Trade Commission based upon findings that petitioners were guilty of unfair and deceptive practices and methods of competition in violation of § 5 of the Federal Trade Commission Act[1] by the advertising of their pocket-sized portable radio transmitter, called Radi-Vox. We think the petition should be denied and the Commission's order should be modified and enforced.

1. 15 U. S. C. §§ 41-46; 47-58.

The corporate petitioner is a Nebraska corporation and the individual petitioners are its officers who control the policies of the corporation. The business is interstate, and the transmitters were advertised nationally in magazines and by mail. In advertising, petitioners represented, directly or by implication, that the Radi-Vox transmitter was effective "from car to car up to 1-10 miles apart," "between buildings up to ½ mile or more," to any home or car without wires, "no wire connections required!"; "no license or permit required anywhere"; "money back guarantee."

A complaint before the Commission charged that petitioners' advertising had the capacity and tendency to mislead the public, (a) by misrepresenting that no license is required to operate the transmitter, (b) by misrepresenting that the transmitter has broadcasting capabilities greater than those which it in fact possesses, and (c) by failure to disclose a service charge in connection with the advertised unconditional guarantee. Petitioners answered the complaint raising issues decided by the hearing examiner.

On petitioners' appeal from the Initial Decision and Order of the examiner, the Commission, while upholding the examiner's decision sustaining the charges against petitioners, modified the recommended cease and desist order and issued the order subject of this petition for review.

Petitioners are ordered by the Commission, among other things, to cease and desist from representing, directly or by implication:

> (a) That their transmitters with or without the use of additional equipment have a satisfactory operational range of any specified distance unless respondents establish that their devices in fact have the operational ranges specified.

> (b) That no license or permit is required for any operational use of their radio transmitters unless the specific conditions under which such license or permit would be required are conspicuously set forth in conjunction therewith.

No objection was made before the Commission to the order to cease and desist from representing

> (c) That any product is guaranteed unless the terms and conditions of such guarantee are clearly and conspicuously set forth, including the amount of any service or other charge which is imposed.

Petitioners argue that there is no substantial support in the evidence for the findings underlying the order with respect to the misrepresentation of the operational range of the transmitter and with respect to the false representations that no license was required for operation of the transmitter.

For its conclusions as to the operational range of the transmitter the Commission relied upon the testimony of expert witness Day, who tested a transmitter furnished by one of petitioners' customers. He made tests in the city, suburbs and country and concluded that communication between the transmitter and cars "up to a mile or more" or between houses "a block or more" was possible, if at all, only under special conditions. Petitioner Paul Beshore testified that since others besides Day were unable to make the transmitter tested by Day work, that transmitter was therefore defective. His testimony was discounted by the Commission because the transmitter's performance in use by Day showed the contrary.

Tests conducted by witness Bourell, engineer in charge of the Kansas City, Missouri office of the Federal Communications Commission, and witness Knight, an FCC Laboratory Engineer, also showed that the transmitter

without additional equipment had an operational range far below petitioners' representations. Expert testimony for petitioners was rejected by the hearing examiner and the Commission because their expert's tests were made with additional equipment whereas the advertisements claimed that no wires or other additional equipment were required.

We see no merit in the contention that tests of two of 20,000 transmitters produced by petitioners as of January 8, 1960 was insufficient evidence on which to base a finding of misrepresentation as to all of the transmitters. There was no evidence to show that performance of any number of the 20,000 lived up to the advertising claims. There was no need of the Commission showing the scientific, in the sense of theoretical, incapability of the transmitters to meet the advertising claims when the tests showed operational incapability. We think the evidence of misrepresentation was sufficient and we are not persuaded that the Commission should have considered the advertisements as mere "puffing."

Typical of petitioners' advertising was that in *Popular Science* magazine that no license was needed to operate their transmitter. There is evidence that when operated with only the equipment, including the attached 16½ inch antenna, sold by petitioners, no license is needed. But the instructions accompanying the transmitter suggested the use of 50 to 100 foot antennas as an aid to enlarging the operational range, and the testimony of FCC engineers Bourell and Knight shows that a license is required for that suggested use. Tests conducted by Bourell were challenged by the testimony of petitioner Paul Beshore. The Commission, however, credited the testimony of the FCC witness rather than that of Beshore, who had an interest in the outcome of the hearing, and

we cannot say that it should not have done so. The Commission correctly refused to consider the advertisements apart from the instructions, which suggested the use of additional equipment in order to achieve better results. The use of additional equipment, according to testimony, was necessary to meet the unqualified claims of the advertisements.

There is substantial, relevant evidence in the record sufficient for a reasonable mind to accept as adequate support for the Commission's findings both as to the misrepresentations of operational range and as to the claim that no license is required. That being so, we must accept those findings, 15 U. S. C. § 45(c). *Erickson* v. *FTC*, 272 F. 2d 318 (7th Cir. 1959), *cert. denied*, 362 U. S. 940 (1960).

Petitioners contend that the Commission's order is too broad in requiring that the "specific conditions" under which a license or permit is required be "conspicuously set forth" in their representation that no license or permit is required for the use of their radio transmitter, since their instruction sheets do not now contain any directions for uses which would require a license. Petitioners need not claim that no license is required to operate their transmitters, but if they choose to do so, in view of their past representations, they may properly be required to reveal the exceptions to their claim lest purchasers be misled into violating FCC regulations. *Cf. American Medicinal Products, Inc.* v. *FTC*, 136 F. 2d 426 (9th Cir. 1943).

Petitioners also attack the order because it forbids representing "that their transmitters, without use of additional equipment, have a satisfactory operational range of any specified distance" unless they "establish" that fact. Petitioners express fear, that they may be

compelled to make proof in advance, of any unknown quantity, to the satisfaction of some unknown person, of prior censorship of advertising, and of a shifting of the burden of proof to them in some later proceeding charging a violation of the order. Reference to the Commission's opinion shows that the word "establish" there was qualified to mean "unless they are able to establish." We take this to mean no more than that petitioners must not speak falsely in advertising their transmitters. In order to make this clear, part (a) of the Commission's order will be modified by the addition of the words "are able to" between the words "respondents" and "establish." We do not anticipate that some court at some future time will regard this order as changing the ordinary rules as to burden of proof.

Petitioners further claim that the order is too broad, that it should be limited to Radi-Vox transmitters and that it gives no guidance as to what they may advertise in the future. The second contention we deem frivolous. As to the first, the record shows that petitioners manufactured other similar products which might be subject to the same type of misrepresentations. The order has a reasonable relation to the prevention of the unlawful practices found to exist and we therefore withhold interference with the exercise of the Commission's power to frame orders. *FTC* v. *National Lead Co.*, 352 U. S. 419, 428 (1957), *National Bakers Services, Inc.* v. *FTC*, 329 F. 2d 365, 367 (7th Cir. 1964). *Erickson* v. *FTC*, 272 F. 2d 318 (7th Cir. 1959), *cert. denied*, 362 U. S. 940 (1960).

At the hearing Commission investigator Snavely testified that he had submitted to the project attorney in Washington a report with which he forwarded the test reports. Petitioners sought to examine this report for impeachment purposes. Their motion was denied by

the hearing examiner and petitioners now claim that under the rule of *Jencks* v. *United States*, 353 U. S. 657 (1957), they were denied a fair hearing. The Commission in its opinion expressly disclaimed any reliance on the testimony of Snavely on any substantive issue. With approval of the parties we ordered the report certified to this court and we have examined it. It is, as the Commission noted after examining it, "a skeletal memorandum of transmittal consisting of one page, forwarding • • • transmitters and listing field reports submitted," with no value for impeachment purposes. Petitioners were not harmed by the error, if any, in the denial of their motion.

For the reasons given, the order is modified as indicated, and as modified the order will be enforced and the petition denied.

Enforcement ordered.

APPENDIX G.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois.

Tuesday, January 19, 1965.

Before:

Hon. John S. Hastings, Chief Judge,
Hon. Win G. Knoch, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge.

Western Radio Corporation, et al., *Petitioners,* vs. Federal Trade Commission, *Respondent.*	Petition for review of an order of the Federal Trade Commission.
No. 14405	

It Is Ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX H.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Western Radio Corporation, a corporation, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, *Petitioners*,	No. 14405.
vs.	
Federal Trade Commission, *Respondent.*	

FINAL DECREE MODIFYING AND, AS MODIFIED, AFFIRMING AND ENFORCING ORDER TO CEASE AND DESIST.

Western Radio Corporation, Paul S. Beshore and W. P. Beshore, petitioners herein, having filed in this Court on November 26, 1963, a petition to review and set aside an order to cease and desist issued by the Federal Trade Commission, respondent herein, on September 25, 1963, in a proceeding before respondent entitled "In the Matter of Western Radio Corporation, a corporation, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, Docket No. 7468"; and the matter having been heard by this Court on the transcript of the record from the Federal Trade Commission, and on briefs, and oral argument of counsel presented October 9, 1964; and this Court having rendered its decision on November 23, 1964;

Now Therefore, It Is Hereby Ordered, Adjudged And Decreed that the prayer of the aforesaid petition to set aside the order of the Federal Trade Commission be, and it hereby is denied;

It Is Further Ordered, Adjudged And Decreed that paragraph (a) of the aforesaid order to cease and desist be, and it hereby is modified to read as follows:

> (a) That their transmitters with or without the use of additional equipment have a satisfactory operational range of any specified distance unless respondents are able to establish that their devices in fact have the operational range specified.

It Is Further Ordered, Adjudged And Decreed that the aforesaid order to cease and desist, as thus modified, be and it hereby is, affirmed, and that petitioners be, and they hereby are, commanded forthwith to obey said order and to comply therewith.

/s/ John S. Hastings,
United States Circuit Judge.

/s/ Win G. Knoch,
United States Circuit Judge.

/s/ Roger J. Kiley,
United States Circuit Judge.

Dated: January 27, 1965.

A True Copy:
Teste:

(Seal)

Kenneth J. Carrick,
Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1079

WESTERN RADIO CORPORATION, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. F, pp. 80–86) is reported at 339 F. 2d 937. The opinion of the Commission (Pet. App. C, pp. 55–73) and its Opinion on Respondents' Exceptions to the Proposed Order (Pet. App. E, pp. 76–79) are not reported.

JURISDICTION

The final decree of the court of appeals (Pet. App. H, pp. 88–89) was entered on January 27, 1965. The petition for a writ of certiorari was filed on April 19, 1965. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

774-205—65

QUESTIONS PRESENTED

The Federal Trade Commission found that petitioners violated Section 5 of the Federal Trade Commission Act by falsely advertising their portable radio transmitter. The questions presented are whether the court of appeals correctly ruled:

(1) that the Commission's finding that petitioners misrepresented the effective ranges of their transmitter is supported by substantial evidence;

(2) that the Commission's order is proper for curing the violations of law found to exist; and

(3) that there could be no reversible error in the Commission's denial of access to a witness's report for impeachment purposes, since the Commission placed no reliance on the witness's testimony in reaching its decision.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

Petitioners manufacture and distribute a portable radio transmitter called the "Radi-Vox." After a

full administrative hearing the examiner found, and the Commission agreed, that petitioners' advertisements violated Section 5 of the Federal Trade Commission Act by misrepresenting (1) the effective range Radi-Vox would transmit without wires or hookups, (2) the nature of the service guarantee attaching to Radi-Vox, and (3) that no license is required to operate Radi-Vox. (Pet. App. A, pp. 21–51; Pet. App. C, pp. 55–73.) A cease and desist order was entered. Petitioners sought review in the court of appeals, which found the Commission's order to be supported by substantial evidence and enforced it with a minor modification. (Pet. App. F, pp. 80–86; Pet. App. H, pp. 88–89.)

The Commission's finding that petitioners had misrepresented the effective range of broadcast without wires or hookups was supported by tests made on two transmitters, which revealed their transmission capabilities to be well below the advertised claims. (Pet. App. C, pp. 58–62.) Petitioners offered evidence of no contrary tests except some made with the aid of wires and hookups, which even then fell short of the advertised claims. (Pet. App. C, pp. 62–63.) The court of appeals found that there was thus substantial evidence in the record to support the Commission's finding that petitioners had misrepresented the range of their transmitters without wires or hookups (Pet. App. F, pp. 82–84) and enforced an order requiring petitioners to refrain from representing that the transmitters have specified effective ranges unless they are able to establish that the transmitters have such capa-

bilities. (Pet. App. F, pp. 84–85; Pet. App. H, pp. 88–89.) [1]

The Commission's conclusion that petitioners' advertising misrepresented the service guarantee attaching to the product has not been challenged, and petitioners do not object to the order that advertising references to the guarantee conspicuously disclose all of its terms and conditions.

Similarly, petitioners do not question the Commission's finding that they had falsely advertised that no license was required to operate their transmitters. This finding was based upon tests showing that when Radi-Vox was used in accordance with the recommendations made in the accompanying instruction sheet it emitted a signal of sufficient strength to require a license from the Federal Communications Commission. (Pet. App. A, pp. 41–47; Pet. App. C, pp. 65–70.) However, petitioners do question the need for the order entered by the FTC, in view of changed instructions now being issued by the petitioners, instructions which no longer suggest the type of operation for which an FCC license would be necessary. (Pet. App. C, p. 71.)

Finally, the court rejected petitioners' claim that they had been denied a fair hearing because they were not given access to a Commission witness's investigative report, which they sought for impeachment

[1] The court of appeals added the words "are able to" to the requirement that petitioners establish the ability of the transmitters to perform as advertised in the future. The court's purpose was to make it clear that petitioners would be free to advertise specific claims if they had at hand the means to establish the truth of the claims upon inquiry of the Commission's Compliance Division. (Pet. App. G, p. 85; Pet. App. H, p. 89.)

purposes. The court held that the error, if any, was harmless, for the Commission expressly refrained from relying upon the witness's testimony. (Pet. App. F, p. 86.) The court also noted that the document was only a bare memorandum of transmittal, having no value for purposes of impeachment. (*Ibid.*)

ARGUMENT

1. The court of appeals correctly concluded that tests made by Commission witnesses adequately supported the Commission's finding that petitioners' advertisements exaggerated the effective ranges over which Radi-Vox would transmit without wires or hookups (Pet. App. F, pp. 82–83). Petitioners' argument, that proof based upon the testing of only two transmitters cannot support the findings, was correctly rejected by the court (Pet. App. F, p. 83). As the court below noted, petitioners offered no evidence showing that any of the transmitters would work as advertised, since all of petitioners' tests were made with supplementary wires and hookups. (Pet. App. F, p. 83; Pet. App. C, pp. 62–63.)

2. Having found that petitioners misrepresented the effective ranges of their transmitters without wires and hookups, the Commission entered an order which, as modified by the court of appeals, requires that petitioners not advertise that their transmitters will transmit over specific distances unless they are able to establish that they will in fact so transmit. (Pet. App. H, p. 89; Pet. App. F, p. 85; Pet. App. O, pp. 74–75.) Essentially, the order prohibits petitioners from falsely advertising the capabilities of their transmitter—the existing practice which the Commission

had found to be illegal. (Pet. App. F, p. 85.) Provisions which thus leave the truth of an advertisement or a representation as a potential issue in a later enforcement proceeding have been employed quite frequently in previous Commission orders which have been approved by the courts. See *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, 979, n. 2, 987 (C.A.D.C.); *Regina Corporation* v. *Federal Trade Commission*, 322 F. 2d 765, 769, 770 (C.A. 3); *Holland Furnace Co.* v. *Federal Trade Commission*, 295 F. 2d 302, 304, 306 (C.A. 7); cf. *Federal Trade Commission* v. *Civil Service T. Bureau*, 79 F. 2d 113, 115–116 (C.A. 6). In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 53–54, relied upon by petitioners, the Commission's order left the ultimate conclusion of injury to competition to the enforcement proceeding, whereas here only a specific question of fact is left to such a proceeding. As the court of appeals pointed out (Pet. App. F, p. 85), the usual rules as to burden of proof would be followed in the event of a later civil penalty action for violation of the order. The precise allocation of burden of proof in a proceeding for violation of the Commission's order is, in any event, most appropriately resolved in the subsequent violation proceeding and review of that issue at this time is therefore unwarranted. See *Vulcanized Rubber and Plastics Co.* v. *Federal Trade Commission*, 258 F. 2d 684 (C.A.D.C.).

3. There was no prejudicial error in denying petitioners access to witness Snavely's investigative report for possible impeachment purposes. The Commission expressly disclaimed any reliance on Snavely's testimony (Pet. App. C, p. 72) and other witnesses

gave substantial testimony supporting all of the Commission's findings (see Pet. App. C, pp. 58–59, 60–61, 66, 68, 72 n. 13 and accompanying text). The court of appeals enforced the order on this basis (Pet. App. F, p. 86). Accordingly, no question of substance relating to the rule of *Jencks* v. *United States*, 353 U.S. 657, is presented.[3]

4. In this Court petitioners do not challenge the Commission's finding (Pet. App. C, pp. 65–72), upheld by the court of appeals (Pet. App. F, pp. 83–84), that petitioners' advertisements misled purchasers into believing that no license was required to operate their transmitters, whereas petitioners' instruction sheet counseled methods of operation which do require an FCC license. On the basis of this finding, the Commission ordered petitioners not to advertise that no license is required unless they also state the conditions under which a license is necessary. Petitioners claim that the Commission exceeded its authority, in view of petitioners' adoption of a new, amended instruction sheet which does not describe methods of operations which require a license. The amended instructions, however, were issued after the Commission had issued its complaint and it is well settled that the abandonment of an illegal practice after the Commission issues its complaint, does not prevent the Commission from framing an order prohibiting such practice. *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149, 153

[3] Both the Commission and the court of appeals looked at the report and the court described it as a "skeletal memorandum of transmittal consisting of one page, forwarding * * * transmitters and listing field reports submitted, with no value for impeachment purposes." (Pet. App. F, p. 86.)

(C.A. 1), certiorari denied, March 29, 1965, No. 885, this Term; *Galter* v. *Federal Trade Commission,* 186 F. 2d 810, 812–813 (C.A. 7), certiorari denied, 342 U.S. 818; *Eugene Dietzgen Co.* v. *Federal Trade Commission,* 142 F. 2d 321, 330–331 (C.A. 7), as modified on denial of rehearing May 3, 1944, certiorari denied, 323 U.S. 730. Without the affirmative disclosure here required, petitioners would be entirely free to resume their former illegal practice. Having broken the law, petitioners can expect some "fencing in." *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 431.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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